# Petition

81-420

Office-Supreme Court, U.S.
FILED
AUG 28 1981
ALEXANDER L. STEVAS,
CLERK

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

R. C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,

*Petitioner,*

vs.

ROBERT LONBERGER.

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. WHETHER THE CONGRESSIONAL MANDATE OF 28 U.S.C. SECTION 2254(d) PRECLUDES THE GRANTING OF HABEAS CORPUS RELIEF ON THE GROUND THAT A PREVIOUSLY ENTERED GUILTY PLEA WHICH WAS UTILIZED ONLY AS AN AGGRAVATING DEATH PENALTY "SPECIFICATION" IS INVOLUNTARY: WHERE THE STATE JUDICIARY HAS MADE EXPRESS FACTUAL FINDINGS SUBSEQUENT TO A FULL EVIDENTIARY HEARING THAT, IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE ENTRY OF THE GUILTY PLEA, THE ACCUSED WAS AFFORDED NOTICE OF THE CHARGES AGAINST HIM AND VOLUNTARILY AND INTELLIGENTLY ENTERED THE PLEA OF GUILTY.

II. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE VACATION OF A STATE COURT MURDER CONVICTION WHERE: A GUILTY PLEA, SUBSEQUENTLY FOUND TO BE INVALID FOR PROCEDURAL FAILURE OF THE RECORD, IS ADMITTED INTO EVIDENCE FOR THE SOLE PURPOSE OF PROVING A DEATH PENALTY ENHANCING SPECIFICATION; THE STATE COURT JURY WAS EXPRESSLY INSTRUCTED THAT THE PRIOR GUILTY PLEA WAS NOT TO BE CONSIDERED FORTHE PURPOSE OF PROVING THE SUBSTANTIVE OFFENSE; THE SUBSTANTIVE OFFENSE WAS VACATED AND MODIFIED UPON APPELLATE REVIEW IN THE STATE COURTS FOR UNRELATED REASONS TO A LESSER CONVICTION NOT INVOLVING THE POTENTIAL OF THE DEATH PENALTY; AND WHERE EVIDENCE OF THE FEDERAL HABEAS CORPUS APPLICANT'S GUILT TO THE MODIFIED SUBSTANTIVE OFFENSE IS OVERWHELMING.

## PARTIES

The petitioner in this action is R. C. Marshall in his capacity as Superintendent of the Southern Ohio Correctional Facility at Lucasville, Ohio. The respondent is Robert Lonberger.

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The decision of the United States Court of Appeals for the Sixth Circuit upon remand from this Court is reported as **Lonberger v. Jago**, 651 F. 2d 447 (6th Cir. 1981) (A-1). The order of this Court vacating and remanding the earlier circuit court judgment is reported as **Marshall v. Lonberger**, ____U.S. ____, 101 S. Ct. 1967 (1981). (A-8). The initial decision of the United States Court of Appeals for the Sixth Circuit is reported as **Lonberger v. Jago**, 635 F. 2d 1189 (6th Cir. 1980). (A-9). The decision of the United States District Court for the Northern District of Ohio, Western Division, is unreported. (A-23). The decision of the Ohio Court of Appeals for the Sixth Judicial District is unreported. (A-38).

## JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on June 11, 1981. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Case No. _____

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OCTOBER TERM 1981

R. C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,

*Petitioner,*

vs.

ROBERT LONBERGER.

*Respondent.*

## STATEMENT OF THE CASE

Respondent Robert Lonberger was indicted by the January, 1975 Term of the Lucas County, Ohio, Grand Jury on two (2) counts for the crime aggravated murder. Count two (2) of the indictment[1] charged respondent with a violation of Ohio Revised Code Section 2903.01(B) which provides in pertinent part:

> No person whall purposely cause the death of another while committing or attempting to commit. . .rape

Under the then prevailing Ohio procedure,[2] imposition of the death penalty for aggravated murder was precluded unless a death penalty "specification" of an aggravating circumstance was separately alleged and proved beyond a reasonable doubt by the prosecution. *See* Ohio Revised Code Section 2929.03. The enumerated death penalty specifications were listed in Ohio Revised Code Section 2929.04. In addition to the principal change of aggravated murder, the Grand Jury indicted respondent pursuant to the specification in Ohio Revised Code Section 2929.04(A)(5) which provided in pertinent part:

---

1. No verdict was returned with respect to count one (1). Thus, only count two (2) is in issue.

2. In **Lockett v. Ohio**, 438 U.S. 586 (1978) and **Bell v. Ohio**, 438 U.S. 637 (1978), this Court held Ohio's former death penalty mechanism unconstitutional on the ground that it unduly restricted the range of "mitigating circumstances" which a convicted murderer might interpose in order to escape execution. However, neither those rulings nor their underlying analysis are pertinent to the herein action.

> The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another. . .

In order to establish the underlying charge of aggravated murder, the State presented evidence which established that the victim Charita Lanier was murdered in her home at approximately 10:00 p.m. on the evening of January 29, 1975. The murder was particularly brutal and death resulted from exsanguination as a result of a slashed throat. A blood-stained and bent twelve-inch knife was found at the scene and identified as the murder weapon. Blood stains indicated that Ms. Lanier was knifed in her living room and that her body was dragged to the kitchen, where it was found, only partially clothed, in a freezer. The victim's young sons, Hillary and Kazedore Lanier, identified respondent and testified that respondent was at their mother's home on the evening of the murder. The children were upstairs in their bedroom while respondent and their mother were together downstairs. Hillary testified that he heard his mother scream. Kazedore testified that he thereafter went downstairs to the kitchen and found that all the lights were off. Respondent then refused to allow him to turn the lights on and ordered him to go back to bed.

In addition to this direct and forensic evidence, the State further established that a cigarette pack of respondent's brand was found in the house. Finally, the State introduced respondent's blood-stained clothing into evidence.

The only evidence indicating that the victim had been raped consisted of autopsy results which revealed the presence of sperm in her vaginal canal.[3]

It was on the basis of the foregoing evidence that the jury returned a verdict of guilty to the substantive crime of aggravated murder.

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3. As will be hereinafter discussed, this wholly circumstantial evidence of rape proved fatal to the prosecution's rape-murder conviction as a matter of state law.

In order to prove the separate and distinct question of respondent's guilt as to the death penalty specification, the prosecution presented evidence pursuant to Ohio Revised Code Section 2945.75(B) which provides:

> Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

In accord with said state statute, the prosecution offered a journal entry of conviction which established that respondent had entered a plea of guilty to the crime of attempted murder before the Circuit Court of Cook County, Illinois, in 1972.

Respondent filed a pre-trial motion to dismiss the death penalty specification alleging that the 1972 Illinois guilty plea was invalid for the reason that it was not knowingly and voluntarily entered. Pursuant to said motion, the Common Pleas Court conducted a full evidentiary hearing.

During the evidentiary hearing, the State presented the certified transcript of proceedings of respondent's 1972 Illinois guilty plea. The record reflected that respondent had been indicted by the May 1971 Term of the Cook County Illinois, Grand Jury on one (1) count for the crime of aggravated battery [causing great bodily harm] in violation of Chapter 38, Section 12-4 of the Amended Illinois Revised Statutes, on two (2) counts for the crime of aggravated battery [using a deadly weapon] in violation of Chapter 38, Section 12-4(b-1) of the Amended Illinois Revised Statutes, and on one (1) count for the crime of attempt [to kill by cutting] in violation of Chapter 38, Section 8-4 of the Illinois Revised Statutes. The record established that on June 7, 1971, respondent appeared before the Illinois Court for the purpose of arraignment and entered pleas of not guilty while represented by counsel. The record further established that respondent remained incarcerated and subsequently obtained alternate counsel.

On March 10, 1972, respondent and his attorney appeared before the Illinois Circuit Court for the purpose of trial. At the outset of the proceedings, respondent's attorney informed the Court that a proposed plea bargain agreement had been reached

and requested a conference in order to obtain the Court's approval. Thereupon, the following colloquy was had between the Court and respondent:

> THE COURT: Do you know what a conference is? That means the State's Attorney, your counsel and myself will sit down and discuss certain things about your case. Thereafter, if everything is acceptable to all, a possible plea and disposition by way of guilty.
>
> Understand that, sir:
>
> THE DEFENDANT: Understand.
>
> THE COURT: Knowing all this, and I am going to find out certain things about the case, as well as certain things about you I would not ordinarily find out at this time, knowing all this information, do you wish for us to have a conference?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Understand after the conference, despite the fact I have this information, you will not be entitled to a substitution of Judges?
>
> Understand that, since you agreed to the conference:
>
> THE DEFENDANT: Yes.

At the conclusion of the in chambers conference, respondent and his attorney conferred and the following exchange occurred:

> MR. XINOS: [Defence Counsel] Mr. Lonberger is before the Court and desires to change his previously entered plea of not guilty to that of guilty.
>
> Ready to proceed.
>
> THE COURT: Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, you are pleading guilty, that you did on August 25, 1968, commit the offense of aggravated battery on one Dorothy Maxwell, and that you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct:

THE DEFENDANT: Yes, sir.

THE COURT: And you did on the same date commit the offense of aggravated battery on one Wendtian Maxwell, is that correct?

That is what you are pleading to, sir?

THE DEFENDANT: Yes, sir.

After advising respondent of those rights which he was waiving by pleading guilty, the Illinois Court further advised respondent of the respective penalties for aggravated battery and attempt as follows:

THE COURT: Understand by pleading guilty I could sentence you from one to ten on the aggravated battery, and attempt one to twenty. So, I could sentence you to the penitentiary for a maximum of from one to forty years.

Understand that?

THE DEFENDANT: Yes, sir.

Respondent then assured the Court that no threats or promises had been made except that he would be sentenced to a term of from two (2) to four (4) years imprisonment. Respondent, through counsel, then stipulated that the indictment "is both sufficient in law and in fact to sustain the charges contained therein, to sustain a finding of guilty on the charges. . ."

Respondent chose to testify in his own behalf during the Ohio pre-trial evidentiary hearing. Respondent testified that he had been incarcerated for a period of thirteen (13) months prior

to the entry of his Illinois guilty plea and, that during this extended period, he had neither been served with a copy of the indictment nor had either of this two (2) attorneys informed him that one of the counts charged him with attempt [to kill by cutting]. Respondent further testified that, despite the Illinois Court's express statement regarding the crime of attempt and subsequent explanation of its attendant penalty, he subjectively believed that he was only "copping out to aggravated battery." Respondent conceded that he was a seasoned veteran of both the criminal court system and the Illinois penal institutions, but professed ignorance of the 1972 proceeding on the basis that Chicago tribunals were "Kangaroo Courts."

The Ohio trial court personally questioned respondent and it was developed that he was both educated, articulate, and remarkably conversant with criminal procedure. At the conclusion of the evidentiary hearing, the Ohio trial court found that respondent's 1972 Illinois guilty plea had been entered voluntarily and with an understanding of the charges against him.

During the course of respondent's trial, a certified copy of the Illinois entry of judgment for the crime of attempt [to kill by cutting] was admitted into evidence. The jury found respondent guilty of the specification and respondent was sentenced to death by electrocution.[4]

Respondent appealed his conviction and sentence to the Court of Appeals for the Sixth Judicial District. On April 22, 1977, the state appellate court issued a comprehensive opinion. (A-38). Relying upon this Court's decision in **Spencer v. Texas**, 385 U.S. 554 (1967), the Court of Appeals held that admission of evidence regarding respondent's prior attempted murder did not constitute a violation of the Due Process Clause of the Fourteenth Amendment. Specifically, the Court found that the following admonition given to the jury by the trial court was in accord with **Spencer** dictates and preempted any concerns that the jury would consider the prior Illinois conviction as evidence of guilt with respect to the crime of aggravated murder:

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4. During trial, respondent offered to *stipulate* to his prior conviction for attempted murder but said stipulation was refused by the prosecution.

> Now, the evidence presented to your concerning a prior conviction of this Defendant, Robert Lonberger, for the offense of attempted murder in Illinois in 1968 is not introduced for the purpose of proving that the Defendant committed the offenses, or either of them, for which he is being tried this week. This evidence was presented to prove the first specification of the first count of the indictment and the first specification of the second count of the indictment as required by law.
>
> It is the responsibility of the jury to make a finding of guilty or not guilty of each of these specifications attached to any count of the indictment upon which you find the Defendant guilty, if you do, in fact, find him guilty of either of the principal charges. These specifications must be proved to you beyond a reasonable doubt.
>
> The only way a jury can determine whether or not the Defendant was previously convicted of the offense of attempted murder as charged by the State in the two specifications previously referred to is to hear and consider evidence tending to prove such a conviction. Thus, this evidence of a prior conviction was presented only for the purpose of proving the prior conviction. This is the only purpose for which you may consider it.
>
> You may not consider it for the purpose of proving, in any way, that the Defendant committed the offenses for which he is being tried today. [Trial Transcript pages 1178-1180].

However, the Court of Appeals went on to hold that the State's proof of guilt with respect to rape was entirely circumstantial and thus, as a matter of Ohio law, was subject to the requirement that it be wholly inconsistent with any reasonable conslusion other than the defendant's guilt. *See* **State v. Kulig**, 37 Ohio St. 2d 157 (1974). The Court held that while

the prosecution had established that the victim had engaged in sexual intercourse, that fact was not wholly inconsistent with a theory of voluntary sexual relations and thus precluded a finding of forcible rape. Accordingly, the Court ordered "that the judgment on the verdict of guilty of aggravated murder in violation of R.C. 2903.01(B) be and hereby is reversed, and that a final judgment of guilty of murder in violation of R.C. 2903.02 be and hereby is entered."

Cross motions for leave to appeal were thereafter dismissed by the Supreme Court of Ohio for want of a substantial constitutional question. In accord with the state appellate court mandate, respondent thus stood convicted of the lesser offense of "having purposely caused the death of another" and was resentenced to a term of from fifteen (15) years to life imprisonment.

Respondent subsequently filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Northern District of Ohio, Western Division. The district court examined the state court record of proceedings and determined that "[f]rom a review of the record, this Court is satisfied that an ordinary person would have understood the nature of the charges to which petitioner was pleading guilty." (A-31). The district court held that the guilty plea satisfied the requirements of Illinois procedure as set forth in Illinois Ann. Stat. ch. 110A Section 402 and construed in **People v. Cook**, 26 Ill. App. 3d 44, 324 N.E. 2d 432 (1975). The district court held that the record demonstrated that respondent's guilty plea was voluntarily and intelligently entered in accord with constitutional dictates in that respondent understood both the nature of the offenses to which he pleaded guilty and their attendent penalties. **Boykin v. Alabama**, 395 U.S. 238 (1969). Relying upon this Court's decision in **Spencer v. Texas**, *supra.*, the district court held that use of the Illinois conviction during respondent's Ohio trial did not offend the provisions of the Due Process Clause. (A-28). Respondent filed a notice of appeal and was granted a certificate of probable cause.

The United States Court of Appeals for the Sixth Circuit reversed the lower court judgment and remanded to the district court for issuance of the writ of habeas corpus. **Lonberger v.**

**Jago**, 635 F. 2d 1189 (6th Cir. 1980) (A-9). The Court of Appeals found the transcript of respondent's 1972 Illinois guilty plea "on its face . . . inadequate to show that the defendant understood the charge to which he was pleading." (A-19). Specifically, the appellate court held that the Illinois trial court's use of the term "attempt" without adding the phrase "to kill by stabbing" deprived respondent of "real notice of the true charges against him." **Henderson v. Morgan**, 426 U.S. 637 (1976). While noting that the fact of respondent's Illinois conviction was used only with respect to respondent's previously vacated death sentence and that a **Spencer v. Texas**, *supra.* limiting instruction had been given to the jury, the circuit court reasoned that **Burgett v. Texas**, 389 U.S. 109 (1967). required that respondent's murder conviction be vacated.

Petitioner thereafter filed a petition for rehearing. Petitioner noted that the Court of Appeals had, in the first instance, found respondent's 1972 Illinois guilty plea to be *facially* invalid. However, the circuit court did not, and upon the basis of the record before it, could not make a finding with respect to respondent's *actual knowledge* of the nature of the charges to which he entered his guilty plea. Petitioner further noted that as the district court had found the guilty plea valid on its face, an evidentiary hearing had not been held, but, that given the circuit court's disagreement as to the facial validity of the plea, the proper remedy was a remand to the district court with instructions to conduct an evidentiary hearing wherein both the Illinois trial judge and respondent's Illinois attorney could testify as to explanations made to respondent regarding the attempt to kill by stabbing conviction.[5] Petitioner further argued that the Illinois conviction had only been admitted for the limited purpose of proving the death penalty specification which had earlier been vacated on unrelated grounds by the

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5. In **Roddy v. Black**, 516 F.2d 1380 (6th Cir. 1975), the district court had determined that the habeas corpus applicant's guilty plea was facially invalid. The district court conducted an evidentiary hearing in order to ascertain the petitioner's actual understanding of the charges to which he pleaded guilty. On the basis of this extrinsic evidence, the district court found as a matter of fact that the petitioner actually understood the nature of the offenses to which he pleaded guilty and dismissed the petition. The circuit court affirmed the district judgment. The herein petitioner's petition for rehearing simply requested that the Court of Appeals adher to such procedure and remand for an evidentiary hearing.

Ohio Court of Appeals. As the jury is expected to follow the limiting instructions tendered by the trial court, it was error for the circuit court to simply presume that the jury did not follow the trial court's admonition. **Spencer v. Texas,** *supra* at page 562. Petitioner finally noted that respondent stood convicted of having "purposely caused the death of another" and that the evidence presented overwhelmingly established respondent's guilty.

The Court of Appeals thereafter issued an order denying the petition for rehearing. (A-21).

Petitioner filed a petition for writ of certiorari with this Court. This Court issued an order granting the petition which vacated the judgment and remanded to the circuit court for reconsideration in light of **Sumner v. Mata,** 449 U.S. ____, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981). **Marshall v. Lonberger,** ____U.S.____, 101 S. Ct. 1967 (1981). (A-8) .

Upon remand, the United States Court of Appeals for the Sixth Circuit did not allow for additional briefing or further argument. Rather, on June 11, 1981, the circuit court *sua sponte* issued an opinion reinstating its former judgment. **Lonberger v. Jago,** 651 F. 2d 447 (6th Cir. 1981). (A-1).

Petitioner's motion to stay the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure was granted. This petition has followed and this matter is once again before this Court.

## ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

### I.

**WHETHER THE CONGRESSIONAL MANDATE OF 28 U.S.C. SECTION 2254(d) PRECLUDES THE GRANTING OF HABEAS CORPUS RELIEF ON THE GROUND THAT A PREVIOUSLY ENTERED GUILTY PLEA WHICH WAS UTILIZED ONLY AS AN AGGRAVATING DEATH PENALTY "SPECIFICATION" IS INVOLUNTARY: WHERE**

**THE STATE JUDICIARY HAS MADE EXPRESS FACTUAL FINDINGS SUBSEQUENT TO A FULL EVIDENTIARY HEARING THAT, IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE ENTRY OF THE GUILTY PLEA, THE ACCUSED WAS AFFORDED NOTICE OF THE CHARGES AGAINST HIM AND VOLUNTARILY AND INTELLIGENTLY ENTERED THE PLEA OF GUILTY.**

The instant case presents an important issue of constitutional law regarding the requisites of a valid guilty plea in view of this Court's decision in **Henderson v. Morgan**, 426 U.S. 637 (1976). The case presents the additional question of the proper allocation of the burden of proof in a federal habeas corpus proceeding in light of the Congressional mandate of 28 U.S.C. Section 2254(d) as interpreted by this Court in **Summer v. Mata**, 449 U.S. ___, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981).

In **Henderson v. Morgan**, *supra.*, this Court stated:

> A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, see, e.g., **Johnson v. Zerbst**, 304 U.S. 458, 464-465, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 ALR 35, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense. **Smith v. O'Grady**, 312 U.S. 328, 85 L. Ed. 85, 61 S. Ct. 572. *Id.* at 645 n. 13.

The habeas corpus applicant in **Henderson v. Morgan**, *supra.*, was a young mentally retarded man indicted for first degree murder. Morgan subsequently entered a plea of guilty to second degree murder. Morgan thereafter filed a petition for writ of habeas corpus alleging that his plea was not intelligently tendered in that he was unaware that intent to cause death was an element of second degree murder. The federal district court conducted an evidentiary hearing and made a finding of fact

that neither the trial court nor Morgan's defense counsel had advised Morgan of the mens rea element. As Morgan had not been given real notice of the true nature of the charge against him, the district court held the plea to be involuntary.

In affirming said judgment, this Court stated that the factual finding of the district court precluded a determination that the plea was voluntary. This Court further noted that the fact that Morgan had never been formally charged with the offense to which he pleaded guilty, coupled with his intellectual deficiency, supported the conclusion that he was uninformed of the "intent" element of the crime. In concurrence, Justice White pointed out the unusual aspect of the case by stating:

> This case is unusual in that the offense to which the defendant pleaded was not charged in the indictment. The indictment charged first-degree murder. The defendant pleaded guilty to the included offense of second-degree murder, the elements of which were not set forth in any document which had been read to the defendant or to which he had access. See **McCarthy v. United States**, 394 U.S. 459, 467 n. 20, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969). In those cases in which the indictment is read to the defendant by the court at arraignment or at the time of his plea, his plea of guilty may well be deemed a factual admission that he did what he is charged with doing so that a judgment of conviction may validly be entered against him. *Id.* at page 650 n. 2.

Having neither been arraigned upon the charge to which he pleaded guilty nor otherwise notified of the "true nature of the charge against him" the Court held that due process mandated vacation of the plea as involuntary. **Smith v. O'Grady**, 312 U.S. 329 (1941).

In response to the State's argument that the Court's ruling would "invite countless collateral attacks on judgments entered on pleas of guilty," the Court dismissed such fears as exaggerated by stating:

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. This case is unique because the trial judge found as a fact that the element of intent was not explained to respondent. Moreover, respondent's unusually low mental capacity provides a reasonable explanation for counsel's oversight; it also forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it lends at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder. *Id.* at page 647.

The Court was careful to emphasis the voluntariness of a guilty plea did not hinge on a ritualistic litany of the formal legal elements of the offense but, rather, a reviewing court should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused. *Id.* at page 644.

In holding respondent's plea to be involuntary, the circuit court wholly failed to adhere to this Court's admonition that the totality of the circumstances surrounding the entry of the plea must be evaluated in order to ascertain whether an accused was afforded real notice of the true nature of the charge against him. The circuit court further failed to accord the deference mandated by 28 U.S.C. Section 2254(d) to the express factual findings made by the Ohio judiciary.

Respondent was indicted on counts of aggravated battery and one (1) count for the crime of attempt. Chapter 38, Section 8-4 of the Illinois Revised Statutes defines attempt as follows:

> A person commits an attempt when, with intent to commit a specific offense, he does any act

> which constitutes a substantial step toward the commission of that offense.

The attempt count of the indictment returned against respondent reads in pertinent part:

> The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon thier oaths aforesaid present that on August 25th, 1968, at and within said County Robert Lonberger committed the offense of attempt, in that he, with intent to commit the offense of murder, intentionally and knowingly attempted to kill Dorothy Maxwell by cutting Dorothy Maxwell with a knife without lawful justification, in violation of Chapter 38, Section 8-4, of the Illinois Revised Statutes 1967.

The circuit court found respondent's guilty plea to be invalid predicated solely upon the very narrow ground that the Illinois trial court, in its colloquy with respondent, stated that "you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct?," rather than "you did on the same date attempt [*to kill*] Dorothy Maxwell, with a knife, is that correct." It was upon this solitary basis that the court below reasoned that respondent's plea had not been intelligently entered with a fundamental notice of the nature of the charge against him. The wholly prophalactic rule enunciated by the circuit court both constitutes an egregious misinterpretation of the Court's ruling in **Henderson v. Morgan**, *supra* and represents a myopic refusal to examine the totality of the circumstances surrounding the entry of the plea which were developed by the state courts.

Prior to trial, respondent filed a motion to dismiss the death penalty "specification" that he had previously been convicted of attempted murder. Respondent sought to collaterally attack the Illinois guilty plea by contending that he thought he was "copping out to aggravated battery" and had no idea that he had ever been charged with, or pleaded guilty to, attempt to kill. The trial court held a lengthy pre-trial evidentiary hearing. Therein, the following facts were developed: (1) that respon-

dent was arrested on February 7, 1971 and charged with the aggravated battery and attempt to kill offenses arising out of a knife attack upon one Dorothy Maxwell and her child; (2) that respondent remained continuously incarcerated in the Cook County Jail from the date of his arrest until the entry of his guilty pleas on March 19, 1972 – a period of approximately thirteen (13) months; (3) that respondent was a seasoned veteran of the Illinois state penal system; (4) that respondent had appeared before criminal courts on numerous occasions on a variety of charges including murder and rape and was well acquainted with the Illinois criminal justice system; (5) that respondent initially retained Attorney George C. Howard to represent him; (6) that shortly after his arrest respondent was arraigned upon the charges against him; (7) that respondent thereafter was afforded a preliminary hearing wherein the victim Dorothy Maxwell appeared and offered testimony; (8) that the judge found probable cause to believe that respondent had committed the offenses charged and bound respondent over to the Grand Jury; (9) that the Grand Jury returned the indictment previously alluded to; (10) that respondent again appeared for arraignment upon the charges and entered pleas of not guilty; (11) that respondent became disenchanted with Attorney Howard and obtained the services of Constantine P. Xinos who enjoyed a professional reputation as a "good public defender"; (12) and that respondent was intelligent and literate.

During the hearing, respondent conceded that he had heard the Illinois trial judge mention the separate charges and their attendent penalties but insisted that he subjectively believed that he was "copping out" to only one (1) count of aggravated battery. Respondent further contended that he was never served with the indictment, that during the entire thirteen (13) month period of his incarceration neither of his attorneys bothered to so much as inform him of what he was charged with, and that neither the judge presiding at his preliminary hearing nor those judges presiding at his two (2) arraignments informed him of said charges. Respondent admitted that he had personally assured the Illinois court that no promises had been made with the sole exception of the sentence to be imposed but asserted that his attorney had essentially told him to lie and go along with whatever the judge said. Respondent offered no evidence or additional testimony which tended to corroborate any aspect of his testimony. Finally, respondent acknowledged that he was fully cognizant

of the fact that he was facing death in the electric chair unless the Illinois guilty plea was ruled invalid.

At the conclusion of the pre-trial hearing, the Ohio trial court made the following pertinent findings of fact:

> . . .that the defendant is an intelligent individual, well experienced in the criminal processes and well represented at all stages of the proceedings by competent and capable counsel in Illinois. On review of the certified copy of the Illinois proceedings and a transcript of the plea of guilty, the Court finds that every effort was taken to safeguard and to protect the constitutional rights of the defendant. Therefore, the Court finds that the defendant intelligently and voluntarily entered his plea of guilty in the Illinois court.

It is thus obvious that the Ohio trial court did not credit respondent's testimony. The Ohio court was clearly empowered to reject respondent's testimony as self-serving and incredible. In **Blackledge v. Allison,** 431 U.S. 63 (1977, this Court examined a similar issue and state in pertinent part:

> The representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formiable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible. **Machibroda,** *supra,* at 495-496, 7 L. Ed. 2d 473, 82 S. Ct. 510 (section 2255); **Price v. Johnston,** *supra,* at 286-287, 92 L. Ed. 1356, 68 S. Ct. 1049 (section 2243). *Id.* at pages 73-74.

The foregoing demonstrates that the facts of the instant cases are not even remotely akin to those presented in **Henderson v. Morgan,** *supra.* Respondent was an intelligent adult

male well versed in the criminal justice system. Respondent pleaded guilty to the *original charges* upon which he had previously attended a preliminary hearing and upon which he had twice been arraigned and entered pleas of not guilty. During the guilty plea proceeding, respondent expressly stipulated that he was guilty of all charges in both law and fact. The hypertechnical and prophylactic "on the record rule" espoused by the circuit court constitutes a marked deviation from the totality of the circumstances test fashioned **Henderson v. Morgan**, *supra*. It is imperative that the circuit court opinion be reviewed in order that the scope and precise meaning of this Court's decision in **Henderson v. Morgan**, *supra* can be definitively stated and thereby provide guidance to the lower federal courts.

There exists a related and equally important issue of national importance which warrants the granting of certiorari.

The initial circuit court opinion was summarily vacated by this Court and remanded for reconsideration in light of **Summer v. Mata**, *supra*. In **Sumner**, this Court held that Congress had enacted 28 U.S.C. Section 2254(d) in order to reduce federal-state friction by requiring deference to state court factual determinations unless the habeas corpus applicant had established that he fell within one of the eight (8) enumerated exceptions to the statute.

Upon remand, the circuit court *sua sponte* issued an opinion reinstating its prior judgment.[6] The court conceded that its conclusions were in direct conflict with those of every other court which previously considered the question but stated that the factual determinations were not fairly supported by the record within the meaning of 28 U.S.C. Section 2254(d)(8). In sole support of said conclusion, the circuit court simply reiterated that the Illinois trial court's failure to add the words

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6. The court did not allow for rebriefing or reargument.

"to kill" in its explanation of the attempt count deprived respondent of notice of the charge against him.[7]

Petitioner submits that the circuit court has quite simply allowed the exception to swallow the rule. Moreover, the reasoning is tautological. Had the district court perceived the supposed failing in the adequacy of the Illinois guilty plea transcript, an evidentiary hearing would have been conducted wherein the testimony of respondent's trial attorney would have been dispositive. *Compare,* **Roddy v. Black,** *supra.* However, as the circuit court, in the first instance, discovered the inadequacy of the record and refused to remand for an evidentiary hearing in order to ascertain respondent's *actual knowledge* of the crimes charged, the now wholly unrelated Ohio murder conviction is vacated. As the circuit court completely failed to state with any specificity the reasons upon which it predicated its refusal to accord deference to the express state court findings, review is warranted so as to evaluate the extent to which compliance with this Court's decision in **Sumner v. Mata,** *supra* is mandated.

## II.

**WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE VACATION OF A STATE COURT MURDER CONVICTION WHERE: A GUILTY PLEA, SUBSEQUENTLY FOUND TO BE INVALID FOR PROCEDURAL FAILURE OF THE RECORD, IS ADMITTED INTO EVIDENCE FOR THE SOLE PURPOSE OF**

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7. The court further stated that "[t]he prosecutors sought to imply by the questioning of Lonberger that he must have heard of the "attempt" charge either at his arraignment or in conversation with his attorney. Lonberger testified that he had not, and the state provided no contrary evidence." (A-8). However, the Ohio trial court did not credit respondent's testimony and the state, through cross-examination, presented overwhelming circumstanial evidence which demonstrated that respondent did, in fact, have knowledge of the charges against him. Petitioner would again emphasize that he vigorously entreated the circuit court to remand the case to the district court for the purpose of conducting an evidentiary hearing which would once and for all alleviate any perceived or subjective reservations entertained by the circuit court. The Court of Appeals steadfastly refused to do so.

**PROVING A DEATH PENALTY ENHANCING SPECIFICATION; THE STATE COURT JURY WAS EXPRESSLY INSTRUCTED THAT THE PRIOR GUILTY PLEA WAS NOT TO BE CONSIDERED FOR THE PURPOSE OF PROVING THE SUBSTANTIVE OFFENSE; THE SUBSTANTIVE OFFENSE WAS VACATED AND MODIFIED UPON APPELLATE REVIEW IN THE STATE COURTS FOR UNRELATED REASONS TO A LESSER CONVICTION NOT INVOLVING THE POTENTIAL OF THE DEATH PENALTY; AND WHERE EVIDENCE OF THE FEDERAL HABEAS CORPUS APPLICANT'S GUILT TO THE MODIFIED SUBSTANTIVE OFFENSE IS OVERWHELMING.**

The instant case presents an important issue of constitutional law regarding the scope and vitality of this Court's decision in **Spencer v. Texas**, 385 U.S. 554 (1967).

In **Spencer**, this Court held that an accused is not denied his rights as secured by the Due Process Clause of the Fourteenth Amendment when a jury considering a substantive criminal charge is advised of the accused's prior criminal convictions for the sole prupose of sentencing enhancement and the jury is given a limiting instruction which preempts consideration of the prior convictions when deliberating upon the guilt or innocence of the defendant. In rejecting the contention that the use of prior convictions in a current criminal trial of an accused was so egregiously unfair upon the issue of guilt or innocence as to offend the Due Process Clause, the Court stated:

> To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this intire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence. For example, all joint rials, whether of several codefendants or of one defendant charged with

> multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge.
>
> * * *
>
> This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest. *Id.* at page 562.

The Court discounted the petitioner's reliance upon decisions such as **Jackson v. Denno**, 378 U.S. 368 (1964), by distinguishing those claims which arise as a result of a specific constitutional right and those which find support only in the more amporphously grounded due process or general "fairness" approach. Specifically, the Court stated:

> In the procedures before us, in contrast, no specific federal right-such as that dealing with confessions-is involved; reliance is placed solely on a general "fairness" approach. In this area the Court has always moved with caution before striking down state procedures. It would be extravagant in the extreme to take Jackson as evincing a general distrust on the part of the Court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can never purge the erroneous introductions of evidence or limit evidence to its rightful purpose. *Id.* at page 565.

It was upon the basis of the aforementioned distinction that this Court decided **Burgett v. Texas**, 389 U.S. 109 (1967). Therein, this jury was made aware of the petitioner's prior uncounseled convictions. The Court held that the limiting instruction tendered by the Texas trial court was insufficient to dissipate the inherent prejudice occasioned by the admission of a conviction constitutionally infirm under the express Sixth Amendment guarantee to counsel. The Court expressly distinguished **Spencer** as follows:

> Our decision last Term in Spencer v. Texas, 385 U.S. 554, 17 L ed 2d 606, 87 S. Ct 648, is not relevant to our present problem. In Spencer the prior convictions were not presumptively void. Moreover, the contention was that the guilt phase of the trial was prejudiced by the introduction of the evidence of prior crimes. As the Court noted, "[i]n the procedures before us . . . no specific federal right-such as that dealing with confessions-is involved; reliance is placed solely on a general 'fairness' approach." Id, at 565, 17 L ed 2d at 615. In this case, however, petitioner's right to counsel, a "specific federal right," is being denied anew. This Court cannot permit such a result unless Gideon v. Wainwright is to suffer serious erosion. *Id.* at pages 115-116.

The instant case closely parallels the enhancement procedure employed by the Texas recidivist statute. Respondent was charged with the substantive offense of felony-murder, i.e., murder during the course of a rape. The State presented overwhelming evidence that respondent was the instrumentality of the victim's death and the savage method used to take her life belays any doubt that the killing was purposeful. As a separate and distinct matter, respondent was additionally charged with a death penalty specification which alleged that he had previously been convicted of attempted murder. The trial court was careful to expressly admonish the jurors that evidence of the earlier Illinois conviction was unrelated to the substantive offense charged and could not be used in any manner during the deliberation upon respondent's guilt or innocence of the murder charged.

Even given that the circuit court's deviation from this Court's prior opinions regarding the requisites of a constitutionally valid guilty plea can withstand scrutiny, the judgment must fail.

Unlike **Burgett**, respondent did not "suffer anew" from the introduction of a "presumptively void" prior conviction obtained in violation of a specific federal right. Rather, respondent has suceeded, years later, in convincing a federal circuit court sitting in a collateral habeas corpus proceeding to adopt a highly prophylactic "on the record" rule with respect to the validity of a guilty plea. This newly fashioned rule goes so far as to prevent a State from defending the integrity of the challenged plea by presentation of evidence which demonstrates that it was entered voluntarily and with a complete understanding of the nature of the offense and its concommittant consequences. The result of the circuit court judgment is to vacate a conviction for murder which is wholly unrelated to the guilty plea determined to be invalid.

The Court of Appeals holding presents a direct and substantial issue of the continuing vitality of this Court's decision in **Spencer v. Texas**, *supra*. In **Spencer**, the Court acknowledged the inherent opportunities for prejudice when the jury is made aware of the prior convictions of an accused. The Court noted that such opportunities for unfairness inhere to "all joint trials, whether of several codefendants or of one defendant charged with multiple offenses" *Id.* at page 562. However, the Court stated that "[i]t would be extravagant in the extreme" to question "the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge" or to state "that limiting instructions can never purge the erroneous introduction of evidence or limit its rightful purpose." *Id.* at page 565. The Court properly reasoned that to hold limiting instructions inadequate to vitiate prejudicial effects "would make inroads into this entire complex code of state criminal evidentiary law." *Id.* at page 562.

The demands of the Due Process Clause were considered in a somewhat varied context by this Court in **Murphy v. Florida**, 421 U.S. 794 (1975). Therein, the record reflected that the state court jurors had been exposed to extensive newspaper coverage of the accused who was referred to by the media as

"Murph the Surf." The jurors had read various accounts regarding the defendant's "flamboyant lifestyle," and were aware of his prior convictions for a notorious jewel theft and for murder. In affirming Murphy's conviction, this Court held that the constitutional standard of fairness does not require that jurors be totally ignorant of the facts and issue involved but, rather, "it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at page 800. To like effect, during the voir dire examination in respondent's state court trial, the jurors assured both the trial court and counsel that they would follow the trial court's instructions and would not consider respondent's prior Illinois conviction as evidence of guilt upon the substantive crime of murder. The holding in **Murphy**, has since been reaffirmed by this Court. *See* **Dobbert v. Florida**, 432 U.S. 282, 303 (1977).

The salient effect of the federal court opinion and order denying rehearing is a declaration that limiting instructions given to a jury are *per se* inadequate to vitiate the possible prejudicial effects which inhere upon reception by the jury of information regarding an accused's prior conviction. Such ruling clearly calls into issue the vitality of this Court's decision in **Spencer v. Texas**, *supra* and, more importantly, its analytical underpinning. A decision by this Court is imperative in order to advise the States of the precise scope of the demands which the Due Process Clause places upon the administration of their criminal justice systems.[8]

The circuit court has invalidated respondent's Ohio murder conviction through an extremely dubious determination that his 1972 Illinois guilty plea was not knowingly and voluntarily entered and despite the fact that such prior conviction is totally unrelated to the crime for which respondent is presently incarcerated. The Ohio jury which convicted respondent of murder assured the trial court that they would consider respondent's guilt or innocence without reference to his prior conviction and

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8. For instance, should this Court affirm the circuit court ruling, many State legislatures might well provide for bifurcated trials in enhanced penalty settings in order to insure the integrity of the substantive crime should, as here, the "aggravating crime" be subsequently invalidated. This is particularly vital in a capital punishment context.

the evidence presented establishes beyond peradventure that respondent is, in fact, guilty of the substantive offense of murder. Indeed, any arguable "error" is clearly subsumed within the ambit of the harmless error doctrine.

As the instant case presents a substantial constitutional question as to the scope and vitality of this Court's decision in **Spencer v. Texas** *supra.* and the impact of that decision upon the orderly administration of the State criminal justice systems, certiorari should be granted in order to resolve this issue of national importance.

Respectfully submitted,

**WILLIAM J. BROWN**
*Attorney General of Ohio*

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**RICHARD DAVID DRAKE**
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*Assistant Attorney General*

*State Office Tower*
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*Columbus, Ohio 43215*
*(614) 466-5414*

**Attorneys for Petitioner**

## CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on respondent Robert Lonberger, by forwarding such copies through the office of his counsel, John Czarnecki, 900 Adams Street, Toledo, Ohio 43624 and Norman G. Zemmelman, 340 Spitzer Building, Toledo, Ohio 43604, by United States Mail, postpaid, this day of , 1981. I further certify that all parties required to be served have been so served. Respondent's address is the Southern Ohio Correctional Facility at Lucasville, Ohio.

**RICHARD DAVID DRAKE**
*Assistant Attorney General*

# Appendix

## APPENDIX

Page

Opinion, June 11, 1981, United States Court of Appeals for the Sixth Circuit, **Lonberger v. Jago**, 651 F.2d 447 (6th Cir. 1980).....A-1

Order, April 20, 1981, Supreme Court of the United States, **Marshall v. Lonberger**, ____U.S.____, 101 S. Ct. 1967, 68 L. Ed. 2d 290 (1981), vacating judgment in **Lonberger v. Jago**, 635 F. 2d 1189 (6th Cir. 1980) .....A-8

Opinion, December 1, 1980 United States Court of Appeals for the Sixth Circuit, **Lonberger v. Jago**, 635 F.2d 1189 (6th Cir. 1980) reversing district court.....A-9

Order, December 30, 1980, United States Court of Appeals for the Sixth Circuit, denying petition for rehearing .....A-21

Opinion and Order, December 7, 1978, United States District Court for the Northern District of Ohio, Western Division dismissing petition for writ of habeas corpus .....A-23

Decision, April 22, 1977, Ohio Court of Appeals for the Sixth Judicial District, affirming with modification the trial court judgment.....A-38

No. 79-3100

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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ROBERT LONBERGER,
*Petitioner-Appellant,*

v.

ARNOLD R. JAGO, Superintendent
Southern Ohio Correctional Facility,
*Respondent-Appellee.*

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Decided and Filed June 11, 1981

Appeal from the United States District Court for the Northern District of Ohio, Western Division.

Before: LIVELY and BROWN, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. Pursuant to the United States Supreme Court's order of April 20, 1981, we now further consider this case in light of **Summer v. Mata**, 449 U.S. – (1981), a decision rendered after our opinion herein of December 1, 1980, 635 F.2d 1189. **Summer** requires that a federal court must explain, in a decision rendered in a habeas corpus suit, its reasons for departing from findings of fact made by a state court after a hearing to which the habeas peititoner was a party.

The relevant facts are as follows: petitioner Lonberger was convicted in the Lucas County, Ohio, Common Pleas Court of aggravated murder with a "specification." The specification was a prior conviction of attempted murder. This prior conviction followed Lonberger's guilty plea in the Cook County, Illinois, Circuit Court in 1972.

In both the Ohio trial court and in the Ohio Court of Appeals, Lonberger unsuccessfully challenged the validity of his 1972 guilty plea and conviction. Lonberger contended that he did not knowingly plead guilty to attempted murder, but rather thought he was "copping out to aggravated battery." His supposed plea to attempted murder was, according to Lonberger, voluntarily but not intelligently made, and thus was not valid under constitutional standards. *See* **Boykin v. Alabama**, 395 U.S. 238 (1969).

The Ohio trial court upheld the validity of Lonberger's 1972 plea following a pretrial evidentiary hearing. The only evidence concerning the validity of ths plea was the transcript of the entry of the plea and the testimony of Lonberger himself. On this evidence, the Ohio trial court found

> that the defendant is an intelligent individual, well experienced in the criminal processes and well represented at all stages of the proceedings by competent and capable counsel in Illinois. On review of the certified copy of the Illinois proceedings and a transcript of the plea of guilty, the Court finds that every effort was taken to safeguard and to protect the constitutional rights of the defendant. Therefore, the Court finds that the defendant intelligently and voluntarily entered his plea of guilty in the Illinois court.

No explicit findings were made concerning Lonberger's credibility as a witness.

The Ohio Court of Appeals, following its own review of the record, held:

> The transcript from the Cook County Circuit Court proceedings at which appellant changed his plea to guilty indicated that he was represented by competent counsel. When questioned by the court, appellant answered affirmatively that he was pleading guilty to "the offense of aggravated battery on one Dorothy Maxwell, * * * attempt on Dorothy Maxwell with a knife, * * * [and] the offense of aggravated battery on Wendtian Maxwell * * *. Appellant further affirmed that he understood that he was waiving his right to trial and to confront

witnesses, that he understood the penalties that could be imposed, that he was motivated to plead guilty by an offer of a reduced sentence, and that he had not otherwise been threatened or promised anything. Through his counsel, appellant stipulated that there were sufficient facts to sustain the charges contained in the indictment. We find from the record of this proceeding and from the record of the pre-trial hearing in the instant case, that the trial court did not err in ruling that appellant's guilty plea was voluntarily and knowingly made and that the evidence of the prior conviction should be submitted to the jury. Appellant's second assignment of error is not well taken.

Lonberger, after exhausting his appellate remedies in the Ohio courts, unsuccessfully petitioned the United States District Court for a writ of habeas corpus. We reversed the judgment of the district court and ordered issuance of the writ should Lonberger not be retried. *See* **Lonberger v. Jago,** 635 F.2d 1189 (6th Cir. 1980). The basis for our judgment was that Lonberger's 1972 guilty plea to attempted murder was not demonstrably an intelligent one, and was therefore invalid under federal constitutional standards. This conclusion is directly contrary to the conclusions of both of the Ohio courts that considered the question of the validity of Lonberger's 1972 plea. We now expressly hold that these factual determinations by the Ohio courts are not fairly supported by the records that were before them. This we are empowered to do by 28 U.S.C. section 2254(d)(8). **Summer v. Mata,** *supra,* requires that federal courts state their rationales for exercise of this power.

The basis for our disagreement with the factual determinations of the state courts can be briefly stated. The question of an effective waiver of a federal constitutional right is governed by federal standards.[1] **Boykin v. Alabama,** *supra,* 395 U.S. at 243. A guilty plea, which works as a waiver of numerous constituional rights, cannot be truly voluntary if the defendant "has such an incomplete understanding of the

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1. The district court erroneously used state standards in analyzing the validity of Lonberger's 1972 plea.

charge that his plea cannot stand as an intelligent admission of guilt." **Henderson v. Morgan**, 426 U.S. 637, 645 n.13 (1976). **Accord, Smith v. O'Grady**, 312 U.S. 329, 334 (1941).

The transcript of Lonberger's 1972 plea is inadequate to show that Lonberger was aware that he was pleading guilty to a charge of attempted murder. The inadequacies of that record were specifically noted in our opinion of December 1, 1980. *See* **Lonberger v. Jago**, *supra*, 635 F.2d at 1193-95. Chief among these inadequacies was the total lack of mention of the charge of "attempted murder." "Attempt" arose in this context:

> The Court: In other words, you are pleading guilty, that you did on August 25, 1968, commit the offense of aggravated battery on one Dorothy Maxwell, and that you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct?

"What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." **Boykin**, *supra*, 395 U.S. at 243-44. The transcript of Lonberger's 1972 plea does not evince such solicitude. The deficiencies in this transcript cause us to differ with the Ohio trial court's finding that "every effort was taken to safeguard and protect the constitutional rights of the defendant" when he entered his 1972 plea.

In the face of this inadequate transcript, the state had to demonstrate clearly and convincingly the validity of the plea. *See* **Lonberger v. Jago**, *supra*, 635 F.2d at 1194, and cases cited there. The state did not meet this burden. At the pretrial hearing, Lonberger testified that he "copped out to aggravated battery" in 1972, but had no knowledge of other charges. The Ohio prosecutors attempted to discredit this testimony by in-

troducing copies of the 1972 indictment charging Lonberger with "the offense of attempt."[2] Lonberger denied that he had

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2. The indictment reads in relevant part:

> The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on August 25th, 1968, at and within said County Robert Lonberger committed the offense of attempt, in that he, with intent to commit the offense of murder, intentionally and knowingly attempted to kill Dorothy Maxwell by cutting Dorothy Maxwell with a knife without lawful justification, in violation of Chapter 38, Section 8-4, of the Illinois Revised Statutes 1967.

The Illinois statute cited in the indictment provided:

> 8-4. section 8-4 Attempt.) (a) Elements of the offense.
>
> A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.
>
> (b) Impossibility.
>
> It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.
>
> (c) Penalty.
>
> A person convicted of an attempt may be fined or imprisoned or both not to exceed the maximum provided for the offense attempted but, except for an attempt to commit the offense defined in Section 33A-2 of this Act,
>
> (1) the penalty for attempt to commit treason, murder or aggravated kidnaping shall not exceed imprisonment for 20 years,
>
> (2) the penalty for attempt to commit any other forcible felony shall not exceed imprisonment for 14 years, and
>
> (3) the penalty for attempt to commit any offense other than those specified in Subsections (1) and (2) hereof shall not exceed imprisonment for 5 years.

This statute obviously did not define a single crime of "attempt," but rather a class of crimes singly denominated "attempt to commit . . . ."

ever seen or read this indictment. The prosecutors sought to imply by their questioning of Lonberger that he must have heard of the "attempt" charge either at his arraignment or in conversation with his attorneys. Lonberger testified that he had not, and the state produced no contrary evidence.[3] Even though the state proved to the trial court's satisfaction that Lonberger was an "intelligent individual, well experienced in the criminal processes and well represented at all stages of the [Illinois] proceedings," such showings do not clearly and convincingly demonstate that Lonberger received adequate notice of all the charges against him.

Lonberger's aggravated murder conviction was obtained at least in part by admission of evidence of a constitutionally inform prior conviction. Such evidence is "inherently prejudicial." *See* **Burget v. Texas**, 389 U.S. 109, 115 (1967). The possible effects of that prejudice cannot be expunged by reducing Lonberger's sentence after a conviction is improperly obtained.

The state has argued, and may argue again, that Lonberger's case should be remanded for an evidentiary hearing so that the state might have a second shot at proving the validity of Lonberger's 1972 plea. We disagree.

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3. In **Henderson v. Morgan**, *supra*, the Supreme Court stated as dictum that "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." 426 U.S. at 647.

Such a presumption is dispelled in this case by: Lonberger's testimony that his lawyers did not discuss the charge of "attempt" with him; Lonberger's switching lawyers between his Illinois preliminary hearing and his 1972 plea, raising the possibility that the second lawyer assumed more information had been given to Lonberger than had been in fact; the 1971 indictment's vague description of the offense of "attempt," and the Illinois trial court's own nebulous delineation of the "attempt" count at the time of Lonberger's plea.

It is also questionable whether such a presumption is proper in a case such as this one in which a prior conviction forms an element of a later crime. Under Ohio law, the "specification" – the prior conviction – had to be proved beyond a reasonable doubt. **State v. Gordon**, 28 Ohio St.2d 45 (1971).

Evidence of the 1972 plea was offered only as proof of a "specification" to aggravated murder – not as proof of commission of the murder charged. See Trial Transcript at 914. The Ohio Court of Appeals reversed Lonberger's aggravated murder conviction and entered a judgment of guilty of murder. The specification is not an element of the crime of murder. See O.R.C. section 2903.02. It was not suggested at trial that evidence of Lonberger's prior conviction could be admitted as proof of motive, identity, intent, or under any other exception to the general common-law rules requiring exclusion of such prejudicial evidence. Admission under such theories may be proper on retrial, if the state shows the validity of the plea. The state, however, may not save a tainted conviction by bootstrapping into evidence an element of a crime of which Lonberger does not stand convicted.

We recognize that **Spencer v. Texas**, 385 U.S. 554 (1967), implied that limiting instructions were enough to dispel prejudice resulting from introduction of prior crimes evidence. The Court has, however, rejected this implication where "specific federal rights" – namely those touching the validity of a confession – were at issue. *See* **Burgett v. Texas**, *supra*, 389 U.S. at 115-16.

The Ohio Court of Appeals itself concluded that "the defendant was prejudiced and prevented from having a fair trial" on the charge of aggravated murder.[4] That prejudice is not erased by simply reducing Lonberger's offense and sentence.

The judgment of the district court is reversed. The case is remanded with directions to issue a writ of habeas corpus unless the State of Ohio grants Lonberger a new trial within a reasonable time as determined by the district court.

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4. The Ohio appellate court held that there was insufficient evidence of the "aggravating" rape to sustain a conviction of aggravated murder.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 20, 1981

Mr. Richard David Drake
State Office Tower
30 East Broad Street, 26th Fl.
Columbus, OH 43215

Re: R. C. Marshall, Superintendent Southern Ohio Correctional facility,
v. Robert Lonberger
No. 80-1463

Dear Mr. Drake:

The Court today entered the following order in the above entitled case:

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Sumner v. Mata, 449 U.S. ____ (1981).

Very truly yours,

/s/ Alexander L. Stevas, Clerk

No. 79-3100

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

ROBERT LONBERGER,
*Petitioner-Appellant,*

v.

ARNOLD R. JAGO, Superintendent
Southern Ohio Correctional Facility,
*Respondent-Appellee.*

APPEAL from the United States District Court
for the Northern District of Ohio, Western Division.

Decided and Filed December 1, 1980

Before: LIVELY and BROWN, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This is an appeal from an order of the United States District Court for the Northern District of Ohio, Western Division, dismissing petitioner's Motion for a Writ of Habeas Corpus. Petitioner, Robert Lonberger, is an Ohio prisoner who was convicted by a jury of aggravated murder with a "specification," which resulted in the death penalty under Ohio's sentencing enhancement statute. Subsequently, the Ohio Court of Appeals reversed the conviction of aggravated murder, and reduced the verdict to the lesser included offense of murder. On remand, the trial court sentenced the defendant to fifteen years to life imprisonment.

Petitioner challenges the constitutionality of his Ohio conviction, and we here consider (1) whether it was error for the trial court to allow evidence of a prior conviction of attempted murder to go to the jury at the same time that the jury was deciding petitioner's guilt or innocence on the substantive charge; and (2) whether the district court erred in holding that petitioner's guilty plea to a charge of attempted murder, the basis of the "specification," was knowingly and voluntarily made.

I.

Petitioner was indicted by the Lucas County, Ohio, Grand Jury and charged with murder while committing rape, defined by Section 2903.01(B), Ohio Rev. Code, as "aggravated murder."[1] The indictment further contained a "specification" that petitioner had been previously convicted of attempted murder. The Ohio statutes under which petitioner was tried provided for life imprisonment upon conviction of aggravated murder unless, in addition to the principal offense, one of seven "specifications" listed in O.R.C. Section 2929.04 was charged and proved at trial, in which case the defendant could be sen-

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1 O.R.C. Section 2903.01 reads:

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

tenced to death. O.R.C. Section 2929.02[2] and 2929.03[3]. A prior conviction of attempted murder was one of the "speci-

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2 O.R.C. Section 2929.02 provides, in pertinent part:

(A) Whoever is convicted of aggravated murder in violation of section 2923.01 of the Rivised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixec by the court, but not more than twenty-five thousand dollars.

3 O.R.C. Section 2929.03 provides:

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, thr trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defence and prosecution, relevant to the penalty which should be imposed

fications" prescribed by the statute. O.R.C. Section 2929.04-(A)(5)[4].

The evidence adduced at trial on the principal charge revealed that on the night of January 29, 1975, Charita Lanier was brutally murdered. The cause of death was exsanguination resulting from a severe laceration of the neck. A bloodstained and bent twelve-inch knife belonging to the victim was found at the scene and identified as the probable murder weapon. An autopsy performed the following morning revealed the presence of sperm in the vaginal canal. No bruises or external signs of trauma were found with the exception of the fatal laceration of the neck. The State also offered testimony that the petitioner was with the victim in her home the night of her death, and introduced into evidence blood-spotted clothing belonging to the defendant.

The state sought to prove the specification of a prior conviction in addition to proving the substantive charge. To this end, the state introduced into evidence a conviction statement, with the indictment appended, from Cook County,

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on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

4 O.R.C. Section 2929.04 provides, in pertinent part:

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictmentpursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

* * *

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

Illinois. These documents indicated that a Robert Lonberger had been convicted of attempted murder in 1972.

Petitioner's pre-trial motion to dismiss the specification on the ground that his 1972 guilty plea to attempted murder had not been knowingly and voluntarily made was rejected by the trial court. The prosecutor and the trial court also rejected appellant's offer to stipulate to having committed the prior offense (the stipulation would have kept from the jury the details of the prior offense, including the fact that it too involved an attack upon a woman with a knife). The admission into evidence of the conviction statement was accompanied by an instruction to the jury that it was not to consider the prior conviction in determining the defendant's guilt or innocence on the substantive charge.

On May 30, 1975, a jury returned a verdict of guilty against the petitioner on the charge of aggravated murder, and it further found him guilty of the specification. Petitioner appealed to the Ohio Court of Appeals, which reversed the verdict of guilty of aggravated murder on the grounds that the State had failed to establish the elements of rape or the identity of the appellant as the offender beyond a reasonable doubt. The Ohio appeals court reduced the verdict to the lesser included offense of murder and remanded the case for sentencing, whereupon defendant was sentenced to fifteen years to life. After exhausting his state court remedies, appellant petitioned the district court for a writ of habeas corpus, which was denied.

II.

Petitioner first charges that the evidence of his prior conviction was not admissible under Ohio law. Alternatively, he argues that a one-stage trial at which evidence of a prior conviction is introduced solely on the issue of punishment violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Petitioner argues that he is entitled, therefore, to a bifurcated trial at which a jury must pass upon the principal offense charged prior to the introduction of any evidence of his previous conviction, which only goes to prove the specification.

With regard to Ohio law, the Ohio Supreme Court rejected the identical argument in **State v. Gordon**, 28 Ohio St. 2d 45 (1971). There the court held that where it is necessary to charge a prior offense in the indictment for purposes of enhanced punishment, as a matter of state law the prior offense becomes an alement of the second offense, and, therefore, "[i]t is not reversible error to read to the jury an indictment which contains the averment of a prior conviction or to place such indictment in the jury's possession during its deliberations [in a single-stage trial]...."

The Ohio legislature has explicitly required that the specification charged here be alleged in the indictment.[5] We conclude, therefore, on the authority of **State v. Gordon**, that the admission of petitioner's prior conviction in a single-stage trial conformed with Ohio's rules of evidence and criminal procedure.

Petitioner's constitutional attack on Ohio's procedure is adequately answered by the **Spencer v. Texas**, 385 U.S. 544 (1967), decision and its progeny. In **Spencer v. Texas** the Supreme Court declined to hold that the Texas procedure of enforcing its recidivist statutes, a procedure identical to that utilized by Ohio in the instant case, violated the due process clause of the Fourteenth Amendment. The Court there recognized the inherent prejudice of prior crimes evidence, but reasoned that a defendant's interest in avoiding such prejudice is outweighed by the state's interest in trying all the issues in a one-stage trial. Following the **Spencer v. Texas** decision, we stated: "[C]ombining in one indictment charges of prior offenses together with the immediate charges, reading the entire indictment to the jury and offering proof of such earlier offenses, all before submitting the case to the jury, [is] not a state practice offensive to the proscriptions of the Fourteenth Amendment." **Haggard v. Henderson**, 382 F.2d 288, 289 (6th Cir. 1967). *See also* **Evans v. Cowan**, 506 F.2d 1248 (6th Cir. 1974); **Wilson v. Wiman**, 386 F.2d 968 (6th Cir. 1967).

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5 *See* Footnote 4, *supra.*

Appellant's attempts to distinguish **Spencer v. Texas** are not persuasive. He argues, for example, that the **Spencer** court noted in its opinion that the prior convictions in Texas were made an element of the principal crime under the Texas habitual criminal statutes. Thus, he continues, the legitimate state purpose in introducing evidence of prior crimes in **Spencer**-type cases is absent here, where the penalty provisions are separate and distinct from the substantive offense. The distinction drawn by petitioner is nowhere to be found in **Spencer.** To the contrary, the Texas recidivist statutes at issue in **Spencer** are very similar to the enhanced punishment statute as issue here.[6] Each of the statutes is concerned solely with the enhancement of punishment; none expressly make a prior conviction an element of a substantive offense.

Appellant would fare no better were we to accept his proposed distinction. For the Ohio Supreme Court has held that a prior conviction is a factual element of the substantive crime to be proved where the prior offense has been charged in the indictment under Ohio's enhanced punishment statutes. **State v. Gordon,** 28 Ohio St. 2d 45 (1971).

Petitioner further argues that the evidence of his previous conviction was particularly inflammatory, an allegation conspicuously absent in **Spencer v. Texas.** Here the jury was given

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6 The recidivist statutes involved in **Spencer v. Texas,** 385 U.S. 554 (1967), were Articles 62, 63 and 64 of the Vernon's Ann. Texas Pen. Code (1952).

Article 62 provides: If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases.

Article 63 provides: Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

Article 64 provides: A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

a copy of the indictment accompanying petitioner's conviction statement. The indictment charged that the defendant "attempted to kill Dorothy Maxwell by cutting Dorothy Maxwell with a knife." Thus, the jury was apprised of the fact that the defendant had previously attempted to murder a woman with a knife, a crime strikingly similar to the one for which he was on trial. In **Haggard v. Henderson**, 382 F.2d 288 (6th Cir. 1967), a Tennessee defendant was found guilty of burglary and larceny in a case in which the prosecution introduced evidence of eight prior convictions for offenses ranging from larceny to attempted murder. The eight prior offenses were offered under the auspices of Tennessee's habitual criminal statute, which required only three prior convictions to be proved. We reversed the district court's grant of a writ of habeas corpus, despite the potential for inflaming the jury by the overkill techniques employed by the state, holding that **Spencer v. Texas** was not "critically distinguish[able]." 382 F.2d at 290. One judge noted that absent the **Spencer** decision, he would have voted to affirm the district court. *Id.* (Edwards, J., concurring). Were we writing on a clean slate, we might vote to reverse the conviction at bar due to the inflammatory nature of the prior crime evidence, especially in light of petitioner's offer to stipulate to the previous offense. We are constrained to hold, however, that no violation of defendant's right to due process occurred in view of **Spencer v. Texas** and our decision in **Haggard v. Henderson.**

Appellant also asserts, without elaboration, that the single-stage trial procedure used in Ohio denied him his Fifth Amendment privilege against self-incrimination, and "chilled" his Sixth Amendment right to a jury trial. The former contention was considered and rejected by the Supreme Court in **McGautha v. California**, 402 U.S. 183 (1971), and requires no further comment. Petitioner's Sixth Amendment argument is that prior crimes evidence may be so prejudicial that a defendant is forced to explore the possibility of pleading guilty to a lesser offense in order to avoid a jury trial and the attendant possible death sentence. The argument assumes that limiting instructions are incapable of mitigating the impact of the disclosure to the jury of the prior conviction. "To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate

to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." **Spencer v. Texas,** *supra,* at 562. The Court there went on to say: "This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function." *Id.*

Petitioner's challenge to Ohio's single-stage procedure is without merit.

III.

We next address the issue of whether petitioner's prior conviction was inadmissible because his plea of guilty was involuntary.

An invalid conviction may not be used to enhance sentencing. **Burgett v. Texas,** 389 U.S. 109 (1967). An involuntary plea of guilty renders a conviction based thereon constitutionally invalid. **Boykin v. Alabama,** 395 U.S. 238 (1969). A guilty plea will be deemed involuntary unless there is a showing that it was intelligently and knowingly entered - an issue governed by federal standards. *Id.*

In the instant case, the State offered, as proof of the voluntariness of petitioner's 1972 plea of guilty to attempted murder in Cook County, Illinois, a conviction statement, and a transcript of the plea's acceptance.

The conviction statement avers that records of the circuit court of Cook County, Illinois, show that a Robert Lonberger was indicted and charged with "AGGRAVATED BATTERY, ETC." That document further states that after initially pleading not guilty, Lonberger withdrew his plea, offered to plead guilty, and his offer was accepted after the trial judge explained the consequence of a guilty plea to the defendant. Petitioner stipulated at trial that he was the Robert Lonberger named in the conviction statement.

The indictment was composed of four charges: three counts of "aggravated battery" and one count of "attempt." With the

exception of one of the aggravated battery charges, all of the offenses charged in the indictment were committed against one Dorothy Maxwell, and occurred on the same date. That part of the indictment charging the offense of "attempt" specified that a Robert Lonberger "with intent to commit the offense of murder, intentionally and knowingly attempted to kill Dorothy Maxwell with a knife." Notwithstanding the conviction statement's averment that the trial judge explained the consequences of a guilty plea to the defendant, at no time juring the hearing at which the guilty plea was entered were the words "murder" or "attempted murder" mentioned by anyone. The transcript of the 1972 Chicago hearing reveals that the following colloquy took place following a conference among the trial judge, the prosecutor and Lonberger's counsel:

> The Court: In other words, you are pleading guilty, that you did on August 25, 1968, commit the offense of aggravated battery on one Dorothy Maxwell, and that you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct?

The Constitution requires, at a minimum, that there be an affirmative showing that a plea of guilty was intelligent and knowing before it is accepted by the trial judge. **Boykin v. Alabama,** *supra,* at 242.

In **Henderson v. Morgan,** 426 U.S. 637, 645 (1976), the Supreme Court, holding that a defendant must receive "real notice of the true charges against him," observed:

> A plea may be involuntary either because the accused does not understand the nature of the constitutional protection that he is waiving or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense.

426 U.S. at 645.

In view of the trial judge's failure to apprise the petitioner at any time that he was pleading guilty to attempted murder, and it nowhere affirmatively appearing in the transcript that

the petitioner was aware that his plea was to the charge of attempted murder, we are compelled to conclude that the transcript on its face is inadequate to show that the defendant understood the charge to which he was pleading.

In **Roddy v. Black**, 516 F.2d 1380 (6th Cir. 1975), we held that "[I]n the face of an inadequate transcript at the time of a guilty plea's acceptance, the state must make a clear and convincing showing that the plea was in fact knowingly and understandably entered." Moreover, the state is not relieved of this duty were the conviction being attacked arose in another jurisdiction. **Graig v. Beto**, 458 F.2d 1131 (5th Cir. 1972); U.S. *ex rel* **Savini v. Jackson**, 250 F.2d 349 (2d Cir. 1957).

In **Roddy v. Black**, *supra*, a case decided prior to **Henderson**, *supra*, we refused to find a conviction invalid where the transcript disclosed that the judge who accepted the petitioner's plea of guilty to assault and battery and immoral and indecent practices made reference only to a charge of "A&B" during the proceeding. Unlike the present case, however, in **Roddy** the state introduced testimony of the petitioner's counsel, the prosecutor, and testimony of the judge who accepted the plea to the effect that the defendant "in fact knew the nature of the charges to which he was pleading guilty." 516 F.2d at 1385. No such evidence was presented at petitioner's pretrial hearing in the present case. In fact, the only extrinsic evidence was the testimony of petitioner. He testified that he had not been apprised of the nature of the charges against him in the 1972 Chicago conviction. He stated that his attorney had told him that he was "copping out to aggravated battery." Peitioner further testified that he never personally received or read the indictment.

In the instant case, the state produced no evidence that petitioner received or read the 1972 indictment charging him with attempted murder. The state introduced no evidence that petitioner's counsel or the court explained that he was charged with attempted murder. Finally, the transcript is inadequate to show that petitioner understood that he was pleading guilty to attempted murder. We hold, therefore, that the state failed to meet its burden to show by clear and convincing evidence that the defendant understood the nature of the charge against him.

We find it unnecessary to decide the additional issues raised by the petitioner in this appeal in view of our holding today that his Ohio conviction was unconstitutional.

The district court is reversed. We remand the case to the district court with directions to issue a writ of habeas corpus unless the State of Ohio grants petitioner a new trial within a reasonable time to be determined by the district court.

No. 79-3100

**UNITED STATES COURT OF APPEALS**
**For the Sixth Circuit**

**ROBERT LONBERGER**
*Petitioner-Appellant,*

v.

**ARNOLD R. JAGO, Superintendent**
**Southern Ohio Correctional Facility**
*Respondent-Appellee.*

**ORDER**

Filed December 30, 1980

Before: LIVELY and BROWN, Circuit Judges, and PECK, Senior Circuit Judge.

Respondent-appellee's petition for rehearing asserts, first, that remand for an evidentiary hearing, rather than for issuance of the writ, is proper in this case, and second, that the issue of the validity of Lonberger's earlier guilty plea is mooted by the state court's reduction of Lonberger's sentence.

Respondent's first assertion relies on **Townsend v. Sain**, 372 U.S. 293 (1963). That case dealt with the power of federal courts to receive evidence where an applicant for a writ of habeas corpus alleges facts which would entitle him to relief. *Id.* at 312. It does not require this Court to allow prosecutors multiple post-trial opportunities to prove facts which should be apparent from transcripts of original proceedings. As Justice Douglas wrote, speaking of guilty pleas, "The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation." **Boykin v. Alabama**, 395 U.S. 238, 242 (1969).

Respondents's second contention is meritless. Lonberger was convicted following a trial at which evidence of a "specification" (prior conviction) was presented. The relevant prior

conviction was the result of an invalid guilty plea. Evidence of this "specification" is entirely irrelevant to the offense of murder of which Lonberger now stands convicted. The effects of this exceedingly prejudicial evidence cannot be expunged by reducing Lonberger's sentence.

The petition for rehearing is ordered DENIED.

/s/ John P. Hehman,
Clerk of Court

No. C 77-658

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT LONBERGER

*Petitioner,*

v.

A. R. JAGO, Superintendent

*Respondent.*

OPINION AND ORDER

Filed December 7, 1978

YOUNG, J:

This cause came to be heard upon the filing of a petition for writ of habeas corpus. 28 U.S.C. Section 2254. Pursuant to Rule 4 of the Rules Governing Section 2254 Proceedings, this Court undertook a preliminary examination of the petition and issued a show cause order on June 14, 1978. Respondent has filed a responsive pleading to the show cause order.

On September 30, 1975, petitioner was convicted of aggravated murder pursuant to Section 2903.01(A) & (B), Ohio Rev. Code, in the Court of Common Pleas of Lucas County. The evidence adduced at trial revealed that on the night of January 29, 1975, one Charita Lanier was brutally murdered. The cause of death was exanguination resulting from a severe laceration of the neck. A blood-stained and bent 12 inch kitchen knife was found in proximity to the victim and identified as the probable murder weapon. Upon an autopsy, an examination revealed the presence of semen in the vaginal canal. Petitioner was found guilty of the charge of murder while commiting rape and sentenced to death by electrocution. Petitioner appealed his conviction to the court of appeals, and thereafter, sought and received a stay of execution pending the outcome of his appeal. Upon consideration of petitioner's claim, the appeals court reversed the verdict of guilty of aggravated murder and ordered a verdict of guilty to the lesser included offense of murder, a

violation of Section 2903.02 of the revised code. The cause was remanded to the trial court for sentencing, and petitioner was resentenced to a term of from 15 years to life imprisonment. Petitioner is currently incarcerated at the Southern Ohio Correctional Facility in Lucasville, Ohio.

Following petitioner's conviction of the lesser included offense of murder, further appeal and cross appeal were taken, although unsuccessfully, to the Ohio Supreme Court. For purposes here, the Court will consider all states remedies to have been exhausted.

Petitioner is represented by counsel and six grounds are raised as a basis for federal habeas corpus relief. They are:

(1) that the trial court erred in allowing evidence of a prior conviction of attempted murder to go to the jury at the same time that the jury was deciding petitioner's guilt or innocence on the substantive offense;

(2) that the trial court erred in refusing to allow petitioner to sufficiently attack the validity of the conviction upon which the court ultimately grounded its imposition of the death penalty;

(3) that the trial court erred in its refusal to allow petitioner to inquire into the procedures utilized by the prosecutor's office in presenting his case to the grand jury;

(4) that the trial court committed error and deprived petitioner of a fair trial by refusing to allow petitioner to question prospective jurors as to their view on capital punishment;

(5) that the trial court erred in admitting certain evidence regarding the consent to a search, and, that there was insufficient evidence for the ultimate finding that the search was consensual; and

(6) that the Ohio Death Penalty Statute violates the United States Constitution.

## I. FIRST GROUND FOR RELIEF

The first allegation, challenging the admission of a prior conviction into evidence before the jury determined petitioner's guilt or innocence on the substantive offense, essentially encompasses a question of state law. The preventing and dealing with crime is much more the business of the individual states than it is of the federal government. **Patterson v. New York**, 432 U.S. 197 (1977). States are free to regulate the procedures in their courts in accordance with their own conception of policy and fairness, unless in so doing, they "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 202, *quoting* **Speiser v. Randal**, 357 U.S. 513, 523 (1958); **Snyder v. Massachusetts**, 291 U.S. 97, 105 (1934). Unless fundamental rights specifically secured by the United States Constitution are invaded, it is clearly not the function of habeas corpus to interfere in the administration of a state's criminal law. **Rogers v. Peck**, 199 U.S. 425 (1905).

In the instant case, petitioner was convicted of aggravated murder pursuant to Section 2903.01 violations states that:

> Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code.

Ohio Revised Code Section 2929.02(A). Ohio Revised Code Section 2929.04 provides in pertinent part that:

> (A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment . . . and is proved beyond a reasonable doubt:
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> * * *
>
> (5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill

> another, committed prior to the offense at bar. . . .

During the trial, the state sought to prove that petitioner previously had been convicted of the crime of attempted murder following entry of a guilty plea. In its effort to prove this prior conviction, the state introduced two documents: a conviction statement indicating that in 1971,[1] petitioner was convicted of "aggravated battery, etc.," and to explain the conviction statement, a copy of an indictment which proceeded the conviction charging petitioner with the crime of the attempted murder of a woman with a knife.[2] Petitioner asserts that the submission of this evidence by the trial court was so prejudicial as to constitute a violation of his rights under the Fifth, Sixth, and Fourteenth Amendments. He suggests that this Court so find, and further establish a rule requiring a two-step procedure in which evidence of prior crimes is withheld until a verdict on the substantive offense is returned by the jury.

In **Spencer v. Texas**, 385 U.S. 554, *rehearing denied*, 386 U.S. 969 (1967), the Supreme Court reviewed a procedure under a Texas recidivist statute whereby for sentencing purposes, a jury trying a pending criminal charge was informed of a defendant's past convictions through allegations set forth in an indictment and the introduction of proof regarding such convictions.[3] Upon receiving such information, the trial court charged the jury that matters relating to prior convictions were not to be considered in assessing one's guilt or innocence under

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1. Petitioner refers to a "1971" conviction throughout his petition, however, upon this Court's examination of the record, the applicable conviction appears to have been in March of 1972.

2. *See* Note 4, *infra*.

3. The recidivist statutes involved were Articles 62, 63, and 64 of the Texas Pen. Code (1952).

   Article 62 provides: If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases.

   Article 63 provides: Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

   Article 64 provides: A person convicted a second time of any offense to which the penalty is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

the current indictment. The Supreme Court considered the procedure followed by the Texas court and stated that merely because a possibility of collateral prejudice existed, such a procedure would not be rendered unconstitutional under the Due Process Clause. *Id.* at 564. That court addressed itself to the power of the states to promulgate their own rules of evidence and found that Texas' introduction of prior convictions under the recidivist statutes did not offend the provisions of the Due Process Clause. *Id.* at 566-69.

The Sixth Circuit had occasion to rely on **Spencer v. Texas**, *supra*, in the case of **Evans v. Cowan**, 506 F.2d 1248 (6th Cir. 1974), wherein the appellant challenged the constitutionality of the admission of evidence of prior felony convictions before the jury determined guilt or innocence on the substantive charge. The appellant was charged with armed robbery and prior felony convictions were admitted, pursuant to a Kentucky statute, for the purpose of punishment determination. *Id.* at 1248-49. Relying on the **Spencer** case, the court found that there was clear error in admitting such evidence, however, such error rested solely on the basis that no limiting instruction was given to the jury. *Id* at 1249.

The recidivist statute and state procedure considered in the **Spencer** case is similar to that which is currently before this Court. In the instant case, for the purpose of sentencing, the jury received evidence of a prior crime of petitioner.[4] Along with this evidence, the jury was charged with a limiting instruction as to the purpose for which petitioner's prior conviction could be considered. The scope of review before this Court focuses on the issue of whether the procedures followed by the trial court fell below federal constitutional restraints. The Due Process clause permits states wide latitude in fashioning rules of evidence and procedure. **Manning v. Rose**, 507 F.2d

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4. Petitioner allegedly offered to stipulate that the conviction statement's wording of "aggravated battery, etc." included the related offense of attempted murder. This apparently was done to keep the indictment, which accompanied the conviction statement, from being submitted to the jury. This stipulation, however, does not appear to affect the instant decision. From a reading of the dissent in the Spencer case, it appears that an offer to stipulate was made therein and refused by the government. *Id.* at 580. The majority, however, did not choose to raise this distinction as an issue which would affect the constitutionality of the procedure of admitting prior convictions.

889 (6th Cir. 1974). On the basis of the above authority, this Court cannot find that the procedure followed by the Ohio court was outside the scope of what the Fourteenth Amendment will tolerate.

In addition to the Fourteenth Amendment claim, petitioner asserts that evidence of prior criminal convictions violated his constitutionally guaranteed right to a fair and impartial jury and his guarantee against self-incrimination. The Court can see no indication that the fair trial concepts embodied in the Fifth and Sixth Amendments were negated by the introduction of evidence of a prior conviction. Courts justify the introduction of evidence which is potentially prejudicial on the ground that the jury is expected to follow its charge to limit such evidence to its proper function. **Spencer v. Texas,** *supra,* at 562. Although petitioner's prior conviction was petentially prejudicial, the jury was properly instructed as to the limited purpose for which such evidence was to be considered. Petitioner's assertion that he was denied a fair and impartial jury because of the submission of evidence of a prior conviction is not well taken.

Furthermore, the introduction of a prior conviction cannot be said to compel or encourage petitioner to become a witness against himself. The state introduced an indictment and a conviction statement into evidence to meet its burden of proof under the statutory provisions of section 2929.04, Ohio Rev. Code. In no way was petitioner put into a compromising position regarding his testimony. In **McGuatha v. California,** 402 U.S. 183 (1971), the Supreme Court considered a Fifth Amendment claim raised by a defendant who had been convicted of murder under an Ohio statute and subsequently sentenced to death. The applicable Ohio statute was one which imposed a death sentence upon the finding of a guilty verdict of first degree murder, unless the jury recommended mercy to the court, whereupon a life sentence would be imposed. *Id.* at 194. The defendant therein claimed that hsi Fifth Amendment rights were violated in that he felt compelled to testify in his desire to address a jury, who in their discretion, could sentence him to death. *Id.* In the instant case, the jury which convicted petitioner did not have the option of a mercy finding, thus petitioner was in no way urged to come forward with evidence on his behalf in an attempt to sway the jury. Even if this had

been the situation, on the merit of the McGuatha case, there would still have been no infringement of petitioner's Fifth Amendment rights. The Court finds no merit to the Fifth Amendment claim.

## II. SECOND GROUND FOR RELIEF

Petitioner's second ground challenges the validity of his 1972 conviction which the state introduced for the determination of punishment. When a state uses a prior conviction to enhance one's punishment, it is bound to defend attacks on the constitutionality of the prior conviction which may be raised. *See* **Burgett v. Texas**, 389 U.S. 109 (1967).

Section 2945.75(B) of the Ohio Revised Code provides that:

> Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

In the instant proceeding, there is no contention that the state failed to meet the above stated burden in that the requisite documentation was submitted and petitioner stipulated to being the individual named in the conviction statement. The alleged error instead lies in the validity of a guilty plea entered in an Illinois court which led to petitioner's prior conviction. Petitioner essentially claims that his prior conviction was invalid since it was based on a guilty plea which was not entered in a voluntary or knowing manner. He asserts that his plea was not voluntary in that he was not apprised of the charges against him at the time of the entry of his guilty plea. Petitioner claims that when the court said:

> In other words, you're pleading guilty that you did on August 25, 1968, commit the offense of aggravated battery, on one Dorothy Maxwell and that you did, on the same date, attempt on Dorothy Maxwell with a knife, is that correct?

And he answered:

> Yes, sir;

he did not realize he was pleading guilty to attempted murder. For a plea of guilty to be constitutionally valid, a defendant must enter the plea both voluntarily and intelligently. **Boykin v. Alabama**, 395 U.S. 238 (1969).

Although the trial court questions its responsibility to inquire into the validity of petitioner's conviction, a pretrial hearing was held to examine whether petitioner's 1972 guilty plea was voluntarily and knowingly entered. The court suggested that the plea might best be attacked in the court in which it was entered, however, it found that the prior conviction was indeed valid. Upon examination of the record of the proceedings, this Court finds that, pursuant to both Ohio and Illinois standards, the guilty plea which petitioner entered in 1972 was both knowingly and intelligently made. The applicable Ohio standard is set forth in the case of **State v. Stone**, 42 Ohio St.2d 163 (1975) in that:

> A defendant's plea of guilty in a filony case, before July 1, 1973, was voluntarily, knowingly, and intellignetly made where the record affirmatively discloses that defendant was advised of the rights he was waiving by competent, privately retained counsel and, in part, by the trial court; that he understood the rights he was waiving, which fact was ascertained by the trial court in a personal inquiry of the defendant; and that he was motivated to do so by a desire to avoid a more severe penalty.

*Id.* Pursuant to the standard as stated, this Court finds that petitioner's plea satisfied the requirements mandated by applicable Ohio law. The controlling law in Illinois for the acceptance of a guilt plea was more stringent than that of Ohio. Under Illinois law, Supreme Court Rule 402 required substantial compliance with the following:

> (a) *Admonitions to Defendant.* The court shall not accept a plea of guilty without first, by addressing the defendant personally in open

court, informing him of and determing that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

Ill. Ann. Stat. ch. 110A section 402. The test for determining whether the essentials of section 402 have been met is whether an ordinary person in the same circumstances as the accused would have understood the remarks and advice of the court as conveying the information required. **People v. Cook**, 26 Ill. App.3d 44, 324 N.E.2d 432 (1975). From a review of the record, this Court is satisfied that an ordinary person would have understood the nature of the charges to which petitioner was pleading guilty. Therefore, the second allegation of the petition is not well taken.

## III. THIRD GROUND FOR RELIEF

Petitioner's third allegation contends that he was denied equal protection of the law when his cause was presented to the grand jury in a manner which differed from the cases of others similarly situated. He claims that of all of the individuals against whom felony murder was charged, only in his case were specifications listed in the indictment which subjected him to the death penalty. He claims error in that he was not permited to inquire into the procedures utilized by the Lucas County Prosecutor's office in presenting his case to the grand jury. He does not appear to challenge the indictment itself, but rather the manner in which the state presented his case to that body.

The Supreme Court has repeatedly recognized a long established policy that maintains the secrecy which surrounds grand jury proceedings. **Dennis v. United States,** 384 U.S. 855, 869 (1966); **United States v. Procter & Gamble Co.,** 356 U.S. 677, 681 (1958). Under Rule 6(e), Fed. R. Crim. P., the Court is empowered to disclose matters occurring before the grand jury. Even subsequent to the promulgation of the rule, however, it has been recognized that "when disclosure is permitted, it is to be done 'discretely and limitedly.'" **Dennis v. United States,** *supra,* at 869; **United States v. Proctor & Gamble Co.,** *supra,* at 683. The Ohio Criminal Rules have an analogous rule to Rule 6(e) which deals with disclosure of grand jury matters. Criminal Rule 6(e) of the Ohio Revised Code authorizes a prosecuting attorney to disclose matters occurring before the grand jury:

> when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

The memorandum submitted by petitioner indicates that he was granted a hearing on a motion to dismiss, however, it appears that in favoring the secrecy of grand jury proceedings, the court would not permit inquiry into procedures used by the prosecuting attorney in its presentment of petitioner's case. Permitting the disclosure of matters which occur before the grand jury rests within the discretion of the trial judge. Upon review, this Court does not find that this discretion was abused or that petitioner's equal protection rights were invaded.

In **Oyler v. Boles,** 368 U.S. 448 (1962), the Supreme Court considered petitioners' claim that they were denied equal protection of the law by the selective use of certain criminal statutes. The statutes involved were habitual criminal statutes. Petitioners contended that such statutes which imposed more severe penalties for those persons which came within the statutory standards, were applied only in a minority of cases. *Id.* at 455. The court considered the statistical data presented by the petitioners and found that such evidence was no

indication that the actions of the prosecutors were the result of a deliberate policy of proceeding only in a certain class of class of cases or against specific persons. *Id.* at 456. The Supreme Court went on that say that:

> the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in the case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

*Id.* This view has recently been reiterated by the Supreme Court and the court has further asserted that so long as a prosecutor has probable cause to believe that an individual has committed an offense which the law prohibits, "the decision whether or not to prosecute, and what charge to file or being before a grand jury, generally rests entirely in his discretion." **Bordenkircher v. Hayes,** _____U.S._____, 98 S.Ct. 663, 668 (1978).

Even if the Lucas County Prosecutor's Office exercised some selectivity with respect to the presentment of petitioner's case, there is no indication that such action had motivations which would raise a constitutional question. Furthermore, there is no indication that the trial judge abused his discretion in refusing to invade the secrecy which surrounds grand jury proceedings.

## IV. FOURTH GROUND FOR RELIEF

The fourth allegation claims error in that the trial court refused to allow petitioner to question prospective jurors about their views on capital punishment during voir dire examination. Petitioner appears to base his fourth allegation on the case of **State v. Bayless,** 48 Ohio St.2d 73 (1976), wherein a defendant asserted error in that the trial court excused a number of prospective jurors who expressed opposition to capital punishment. The Supreme Court of Ohio found that such excuses for cause were valid in that they were not based strictly on a juror's opposition to capital punishment, but rather on a juror's

assertion that he could not render a fair and impartial finding because a death sentence might result. *Id.* at 88. Although the Supreme Court of Ohio asserted that a juror's opinion on capital punishment could prevent him from impartially applying the law to the facts, *Id.* at 89, this Court is not persuaded by petitioner's claim that a failure to inquire into the prospective jurors' views on capital punishment deprived him of a fair trial.

The recent Supreme Court decision of **Ristaino v. Ross,** 424 U.S. 589 (1976), considered whether a black defendant was denied a fair trial because the jury was not questioned specifically about racial prejudice. The Supreme Court found there was no error of constitutional dimension since a general and thorough inquiry as to impartiality was made to the prospective jurors. In reaching its decision, the Supreme Court stated:

> The Constitution does not always entitle a defendant to have questions posed uring *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him. **Ham**, *supra*, at 527-528. *Voir dire* "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." **Connors v. United States,** 158 U.S. 408, 413 (1895); *see* **Ham** *supra* at 527-528; **Aldridge v. United States,** 283 U.S. 308, 310 (1931). This is so because the "determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." **Rideau v. Louisiana,** 373 U.S. 723, 733 (1963) (Clark, J., dissenting). Thus, the State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant. **Ham,** *supra* at 527-528. [footnote omited].

*Id.* at 594-95.

During voir dire examination in the instant case, the veniremen were presented with a number of questions which explored whether they would be able to render an impartial decision as to petitioner's guilt or innocence on the crime charged. There is no indication that the trial court's failure to inquire into the specific matter of capital punishment resulted in the empaneling of a jury which could not render a fair and impartial finding based on the evidence. Therefore, the Court does not find that petitioner was denied a fair trial which violated his rights under the Constitution.

## V. FIFTH GROUND FOR RELIEF

The fifth allegation essentially claims that petitioner's residence was searched without proper consent. He further claims that it was error for the trial court to admit alleged hearsay testimony into evidence when considering the matter and that there was insufficient evidence for the ultimate finding that the search in question was in fact consentual.

It is well established that evidentiary questions are not cognizable in federal habeas corpus "unless it is shown that the errors are no conspicuously prejudicial as to deprive the defendant of a fair trial." **Reese v. Caldwell,** 410 F.2d 1125, 1126 (6th Cir. 1969), *quoting,* **United States ex rel. Cannon v. Maroney,** 373 F.2d 908, 910 (3rd Cir. 1967). This Court does not find that the effect of the alleged error in the instant case was so prejudicial as to deny petitioner's constitutional right to a fair trial. Furthermore, petitioner received a full and fair hearing on the issue at a state court motion to suppress hearing. This being so, the matter is not cognizable in a federal habeas corpus proceeding. **Stone v. Powell,** 428 U.S. 465 (1976). Thus, the Court finds the fifth ground for relief not well taken.

## VI. SIXTH GROUND FOR RELIEF

The final allegation challenges the constitutionality of the Ohio Death Penalty Statute. In view of the recent Supreme Court decision in **Locket v. Ohio,** _____U.S._____(1978), the death penalty in Ohio has been ruled unconstitutional and therefore consideration of this issue is precluded.

THEREFORE, for the reasons stated herein good cause appearing, it is

ORDERED that the petition for writ of habeas corpus be, and it hereby is, dismissed.

IT IS SO ORDERED.

/s/
United States District Judge

Toledo, Ohio
December 7, 1978.

Civil Action File No. C77-658

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO / W.D.

Robert Loneberger

*Petitioner,*

v.

Arnold Jago, Supt.

*Respondent.*

# JUDGMENT

Filed December 7, 1978

This action came on for consideration before the Court, Honorable Don J. Young, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that the petition for writ of habeas corpus is dismissed.

/s/ James S. Gallas, Esq.
Clerk of Court

Civil Action File No. L-75-208

COURT OF APPEALS OF OHIO, SIXTH DISTRICT
COUNTY OF LUCAS

State of Ohio,

*Appellee,*

v.

Robert Lonberger,

*Appellant.*

DECISION AND JOURNAL ENTRY

Filed April 22, 1977

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

Defendant-appellant Lonberger (hereinafter appellant), was indicted on two counts: (1) murder with prior calculation and design in violation of R.C. 2903.01(A), to which specifications were attached charging a prior conviction of attempted murder and murder while committing rape, and (2) murder while committing rape in violation of R.C. 2903.01(B), to which a specification was attached charging a prior conviction of attempted murder.

Appellant was tried by jury. The evidence at trial revealed the following. At approximately 10:00 p.m. on the night of January 29, 1975, Charita Lanier was murdered in her home at 1518 Fernwood, Toledo. Death resulted from exsanguination from a throat wound. Blood stains indicated that the victim was knifed in the living room and that her body was then dragged to the kitchen, where it was found, partially clothed, in a freezer. A blood-stained knife was found in the kitchen sink. The presence of semen in the victim's vaginal canal indicated sexual intercourse within an undetermined period preceding her death. The victim's sons, Hillary and Kazedore Lanier, ages 8 and 6, respectively, identified the appellant and testified that while the appellant was there, he, Hillary, had heard a scream. Kazedore testified that he went downstairs from his bedroom

later that evening to the kitchen; that the lights downstairs were all off; that he did not see his mother, but that the appellant refused to let him turn on the lights and told him to return to the upstairs, which he did. On the basis of this and other circumstantial evidence, including blood-spotted clothing belonging to the appellant and a cigarette pack of appellant's brand found in the house, appellant was found guilty on the second count of the indictment and on the specification attached thereto. Following psychiatric examination and re-examination, a mitigation hearing was held pursuant to R.C. 2929.04(B), and no mitigating circumstances being found, the trial judge sentenced appellant to be executed. Appellant appeals the judgment and the sentence, assigning eleven assignments of error.

Appellant's first and second assignments of error, relating to the evidence of his prior conviction, are as follows:

> "1. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF A PRIOR CONVICTION OF ATTEMPTED MURDER TO GO TO THE JURY AT THE SAME TIME THAT THAT BODY WAS DECIDING THE DEFENDANT'S GUILT OR INNOCENCE OF THE SUBSTANTIVE OFFENSE.
>
> II. THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO ATTACK THE VALIDITY OF THE CONVICTION UPON WHICH THE COURT ULTIMATELY GROUNDED ITS IMPOSITION OF THE DEATH PENALTY."

Under Ohio's new criminal code, the death penalty for aggravated murder is precluded unless the indictment charging the offense specifies one or more of the aggravating circumcircumstances listed in R.C. 2929.04(A). If the indictment specifies an aggravating circumstance that circumstance must be proved beyond a reasonable doubt and the fact finder must return separate verdicts on the charge and on the specification. If the fact finder be a jury, the jury must be instructed on its duties in regard to its findings on the specification. A prior conviction for purposeful killing or attempt to kill is an aggra-

aggravating circumstance under R.C. 2929.04(A).

Appellant contends in his first assignment of error that the prior conviction was not an element of the crime of aggravated murder with which he was charged, and therefore, that it was error for the court to allow evidence of the prior conviction to go to the jury. In the alternative, appellant argues that if evidence of a prior conviction was properly submitted to the jury, nevertheless it was prejudicial and, therefore, a violation of his right to a fair trial to allow submission of such evidence at the same time the jury was determining the appellant's guilt of the principal offense charged. We find this assignment of error not to be well taken for the following reasons.

In Spencer v. Texas (1967), 385 U.S. 554, the United States Supreme Court reviewed a Texas recidivist statute which was similar to Ohio's R.C. 2929.03 in providing that the indictment charging the pending crime should also specify past convictions and that the jury which determined guilt of the pending crime should also find as to whether the defendant had previously been convicted of a similar offense. The Court acknowledged that states have a valid governmental interest in the convenience of trying at one time the elements of the crime charged and the elements of circumstances which would enenhance the penalty. The Court held that the Texas recidivist statute was not unconstitutional since under the statute the jury which heard the evidence of the prior conviction was given instructions limiting its consideration of that evidence to its proper function.

Citing from Spencer, supra, the Ohio Supreme Court held in State v. Gordon (1971), 28 Ohio St. 2d. 45, that where a criminal statute provides that in order to impose a second offense penalty it is necessary to charge a prior conviction in the indictment, that former conviction becomes an element of the present offense charged and it is not error "to read to the jury an indictment which contains the averment of a prior conviction or to place such indictment in the jury's possession during its deliberations."

Appellant contends in his second assignment of error that the trial court erred in ruling, in a preliminary order, that the prior conviction was valid and admissible in evidence at the trial.

Pursuant to R.C. 2929.04(A), the state has the burden of proving the specifications, such as the prior conviction, beyond a reasonable doubt. The means of proof is set forth at R.C. 2945.75(B), which reads as follows:

> "Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the degendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

In the instant case, the state sought to prove appellant's prior conviction by introducing into evidence a certified copy of a 1972 conviction statement from Illinois showing that the Cook County Circuit Court had in that year entered a guilty judgment against a Robert Lonberger on a plea of guilty to the crime of "AGGRAVATED BATTERY, ETC. in manner and form as charged in the Indictment in this cause." The indictment, which the state also sought to admit in relevant part, contained four charges: two counts of aggravated battery on Dorothy Maxwell, one count of attempted murder on Dorothy Maxwell, and one count of aggravated battery on Wendtian Maxwell. Appellant stipulated his identity as the person named in the conviction statement.

In a pre-trial hearing to determine the admissibility of the conviction statement, appellant argued that his prior conviction was invalid in that he had not knowingly pled guilty to attempted murder, but had knowingly pled guilty only to aggravated battery. When the state wishes to use a defendant's prior conviction in subsequent proceedings for the purposes of enhancement of punishment, the state is bound to defend attacks on the constitutionality of the prior conviction leveled by the defendant. See Burgett v. Texas (1967), 389 U.S. 109; State v. Johnson (1971), 26 Ohio St. 2d. 43. One of the basic requirements of a constitutional plea of guilty is that it be voluntarily and intelligently entered by the accused. Boykin v. Alabama (1969), 395 U.S. 238.

In State v. Stone (1975), 43 Ohio St. 2d. 163, the Ohio Supreme Court held:

> "A defendant's plea of guilty in a felony case, before July 1, 1973, was voluntarily, knowingly and intelligently made where the record affirmatively discloses that defendant was advised of the rights he was waiving by competent, privately retained counsel and, in part, by the trial court; that he understood the rights he was waiving, which fact was ascertained by the trial court in a personal inquiry of the defendant; and that he was motivated to do so by a desire to avoid a more severe penalty."

See also State v. Griffey (1973), 35 Ohio St. 2d. 101, and State v. Piacella (1971), 27 Ohio St. 2d. 92.

The transcript from the Cook County Circuit Court proceedings at which appellant changed his plea to guilty indicated that he was represented by competent counsel. When questioned by the court, appellant answered affirmatively that he was pleading guilty to "the offense of aggravated battery on one Dorothy Maxwell, * * * attempt on Dorothy Maxwell, with a knife, * * * [and] the offense of aggravated battery on Wendtian Maxwell * * *." Appellant further affirmed that he understood that he was waiving his right to trial and to confront witnesses, that he understood the penalties that could be imposed, that he was motivated to plead guilty by an offer of a reduced sentence, and that he had not otherwise been threatened or promised anything. Through his counsel, appellant stipulated that there were sufficient facts to sustain the charges contained in the indictment. We find from the record of this proceeding and from the record of the pre-trial hearing in the instant case, that the trial court did not err in ruling that appellant's guilty plea was voluntarily and knowingly made and that the evidence of the prior conviction should be submitted to the jury. Appellant's second assignment of error is not well taken.

Appellant's assignment of error No. 3 is as follows:

> "III. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS CERTAIN EVIDENCE SEIZED IN THREE WARRANTLESS SEARCHES CONDUCTED AT THE DEFENDANT'S RESIDENCE AT 915 HESTON STREET."

Toledo Police Department Detective Howard conducted three warrantless searches of the residence at 915 Heston Street, Toledo, one at about noon on January 30, 1975, one the evening of January 30, and one on January 31, 1975. Nothing was found or removed on the first search, but items of clothing and a cassette were removed during the subsequent searches. Appellant claims that these searches were in violation of the Fourth Amendment to the United States Constitution, and that his motion to suppress the evidence seized should have been granted at the pre-trial suppression hearing, because the prosecutor failed to prove valid and voluntary consent by thrid parties to the search in that the testimony Detective Howard offered to establish consent to search was hearsay and, therefore, inadmissible.

Third parties may give consent to a search, the results of which may be introduced at trial into evidence against the accused, so long as the consent is voluntarily given and the thrid person owns or controls the premises, or has equal rights to the possession or use of the premises. United States v. Matlock (1974), 415 U.S. 164. The person giving consent to search need not have been advised of his right to refuse in order for such consent to be considered voluntary. Schneckloth v. Bustamonte (1973), 412 U.S. 218.

When the lawfulness of the search is challenged, the prosecution has the burden of proving that the consent was freely given. Bumper v. No. Car. (1968), 391 U.S. 543, 548; State v. McCarthy (1969), 20 Ohio App. 2d. 275, aff'd. 26 Ohio St. 2d. 87 (1971). The burden must be met by a preponderance of evidence. Lego v. Twomey (1972), 404 U.S. 477. See also 1 Anderson's Ohio Criminal Practice & Procedure, Sec. T. 23.6(B)(2) (b).

At the pre-trial hearing, Detective Howard testified that he received permission to search the house at 915 Heston Street the first time from Verlene Washington, who was present and lived in the house. This first search was for the person ofthe appellant. Subsequently, on January 30, after the appellant had been arrested, Detective Howard searched the house again, this time for evidence. He testified that he had permission to search the house from the owner, Ethel Washington, as well as consent from the appellant and from Everlene Bobo to search their bedroom. Further, Detective Howard testified that on Janurary

31st Everlene Bobo called him to report that she had found clothing that he was looking for in the basement of the house. He returned to the residence to get the clothing, and Verlene Washington let him in and gave him permission to retrieve the items from the basement.

If Detective Howard's testimony be accepted as true, the preponderance of evidence would support the legality of the searches based on the valid consent of third parties. However, appellant contends that Detective Howard's testimony relative to consent was hearsay and therefore inadmissible. The rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence; hearsay evidence may be admissible in a suppression hearing if the judge is convinced that the statements had, in fact, been made and that the statements were true. United States v. Matlock, supra at pp. 172-77. Since the appellant here did not call any witnesses at the suppression hearing to contradict Detective Howard's testimony relative to the consent to search, we find it was not an abuse of the trial court's discretion to admit the hearsay evidence and to deny the motion to suppress based on that evidence. Appellant's assignment of error No. 3 is not well taken.

Appellant's assignment of error No. 4 is as follows:

> "IV. WHERE THE ONLY EVIDENCE SUPPORTING A CONVICTION OF RAPE IS CIRCUMSTANTIAL, AND THERE EXISTS A REASONABLE THEORY OF INNOCENCE WHICH IS CONSISTENT WITH THE EVIDENCE SO PRESENTED, THE CONVICTION CANNOT STAND FOR IT IS GROUNDED IN INSUFFICIENT EVIDENCE AND IS THEREFORE CONTRARY TO LAW AND THE TRIAL COURT ERRED IN NOT GRANTING A DIRECTED VERDICT AS TO THE SECOND COUNT OF THE INDICTMENT."

R.C. 2907.02 defines the crime of rape, in pertinent part, as follows:

> "(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

"(1) The offender purposely compels the other person to submit by force or threat of force.

* * *

The prosecution must prove all elements of the crime and the identity of the defendant as the offender beyond a reasonable doubt. 15A Ohio Jur. 2d. Crim. Prac. and Procedure, Sec. 203.

In proof of rape, the prosecution offered the following circumstantial evidence: the presence of semen in the victim's vagina and the fact that when found, the victim was dressed only in socks and in a bra, blouse, and sweater, which were torn. The semen was not laboratory tested so that it could be compared to appellant's sperm or blood type, and expert testimony as to the rate of disintegration of sperm failed to indicate when intercourse occured in relation to the time of death. In proof of the identity of the appellant as the offender, the prosecution offered testimony of the victim's young sons that the appellant was present in the victim's home the evening of January 29 when the murder and alleged rape occurred.

At the close of the prosecution's evidence, the appellant moved for a dismissal, inter alia, of the count of the indictment charging rape on the grounds that the state had failed to make a prima facie case. The court denied this motion, which was in effect a motion for judgment of acquittal, and the appellant proceeded to his defense. Appellant failed to renew the motion for acquittal at the conclusion of all the evidence. Failure to renew the motion precludes this court from considering on appeal whether the trial court's denial of the motion at the end of the state's evidence was error. State v. Cantu (1971), 27 Ohio App. 2d. 55; State v. Pinnick (1937), 23 Ohio L. Abs. 560; 1 Anderson's Ohio Criminal Practice and Procedure, Sec. T 36.4. In this respect, appellant's assignment of error No. 4 is not well taken.

Assignment of error No. 4 further alleges error in that the conviction of rape is grounded in insufficient evidence and is contrary to law. Where the state relies exclusively on circumstantial evidence for proof of a crime, the inferences created

therefrom must be of such character that they are wholly inconsistent with any reasonable conclusion other than defendant's guilt. State v. Kulig (1974), 37 Ohio St. 2d. 157; State v. Sheppard (1956), 165 Ohio St. 293, cert. den. 352 U.S. 910 (1956) 1 Anderson's Ohio Crim. Prac. & Procedure, Sec. T 32.7.

Reviewing the record, we do not find that the prosecution's evidence established the elements of rape or the identity of the appellant as the offender beyond a reasonable doubt. Rape by the appellant could reasonably be inferred from the evidence, but so could voluntary intercourse, either with appellant or with someone else. Therefore, in respect to the sufficiency of the evidence, we find appellant's assignment of error No. 4 to be well taken.

Appellant's assignment of error No. 5 is as follows:

> "V. THE TRIAL COURT ERRED IN REFUSING TO DISMISS COUNT 1 OF THE INDICTMENT FOR THE REASON THAT THE STATE FAILED TO PRODUCE ANY EVI-DENCE FROM WHICH THE JURY COULD CONCLUDE, BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT 'PURPOSELY, WITH PRIOR CALCULATION AND DESIGN, CAUSE[D] THE DEATH OF ANOTHER.' "

Count 1 of the indictment charged appellant with violating R.C. 2903.01(A), which prohibits killing another "purposely, and with prior calculation and design." Count II charged appellant with a violation of R.C. 2903.01(B), which prohibits killing of another "purposely * * * while committing or attempting to commit * * * rape * * *."

We find that as there was circumstantial evidence of prior calculation and design in the fact that the murder was committed in the living room with a knife from the kitchen, the trial court did not err in refusing to dismiss Count 1 of the indictment at the close of the prosecution's evidence. The state having introduced sufficient circumstantial evidence to establish a prima facie case of prior calculation, it was for the jury to

decide whether any conclusion other than appellant's guilt could reasonably be inferred from that evidence.

Furthermore, we note that upon the evidence the jury returned a verdict of guilty to Count 2 of the indictment and guilty of the specification attached thereto. The jury returned no finding on Count 1 of the indictment. It was permissible, although not desirable, for the trial court to accept the verdict in that form. The trial court may receive a verdict in which the defendant is found guilty of one count without a finding as to other counts. Jackson v. State (1883), 39 Ohio St. 37. The failure to find that defendant guilty on Count I is the equivalent of an acquittal of the charges on that count. See Morehead v. State (1877), 34 Ohio St. 212, which states that under the prior criminal code a verdict of guilty of murder in the second degree upon the trial of an indictment for first degree murder without expressly acquitting the defendant of first degree murder is good, the verdict being equivalent to "not guilty" of the higher degree. As the jury acquitted the appellant on Count I, any error in not dismissing that Count cannot be deemed prejudicial. Appellant's assignment of error No. 5 is not well taken.

Appellant's assignment of error No. 7, which we consider here out of order, is as follows:

> "VII. THE DEATH PENALTY CONSTITUTES THE KIND OF CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS WELL AS ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION, BY OFFENDING CONTEMPORARY STANDARDS OF DECENCY."

The Ohio Supreme Court held in State v. Bayless (1976), 48 Ohio St. 2d. 73, that Ohio's statutory framework for the imposition of capital punishment is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution. We find appellant's assignment of error No. VII not well taken for the reasons stated in Bayless.

Appellant's assignment of error No. 6 is as follows:

"VI. OHIO REVISED CODE SECS. 2903.01, 2929.03 AND 2929.04 ALLOW IMPOSITION OF THE DEATH PENALTY IN SUCH AN ARBITRARY AND CAPRICIOUS FASHION AS TO CONSTITUTE A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS WELL AS ARTICLE I, SECS, 2, 9 AND 16 OF THE OHIO CONSTITUTION."

Of the statutes referred to by the appellant, R.C. 2903.01 defines the crime of aggravated murder, R.C. 2929.03 specifies the procedure for imposing sentence for a capital offense, and R.C. 2929.04 lists the aggravating and mitigating circumstances to be considered in sentencing for a capital offense. Appellant alleges that these sections are unconstitutional in that they allow the imposition of the death penalty in an arbitrary and capricious manner. Specifically, appellant challenges as standardless the discretion exercised at the various levels of the criminal proceeding by the grand jury, the prosecutor, the fact finder, the sentencing authority, and the executive (the pardoning authority).

As to all stages of the criminal proceeding other than the sentencing stage, we follow the reasoning of the United States Supreme Court in Gregg v. Georgia (1976), _____U.S._____, 49 L. Ed. 2d. 859, and the four accompanying death penalty cases, and of the Ohio Supreme Court in State v. Bayless, supra, and find that:

> "The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in a criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Gregg, supra at p. 889.

As to the sentencing stage, appellant particularly objects to the statement of mitigating circumstances in R.C. 2929.04(B) as being so vague as to fail to provide adequate standards to guide the sentencing authority. R.C. 2929.04(B) reads as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderence [preponderance] of the evidence:
>
> "(1) The victim of the offense induced or facilitated it.
>
> "(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

In respect to those mitigating circumstances, the Ohio Supreme Court held in Bayless, supra, at 86:

> "* * * we conclude that those [mitigating circumstances] which are listed do direct inquiry both to the circumstances of the crime and to the individual culpability of the defendant, and so adequately guide the decision of the sentencing authority."

Subsequently, in State v. Osborne (1976), 49 Ohio St. 2d. 135, the court specifically addressed itself to the mitigating circumstances provision and held that provision not to be unconstitu-

tionally narrow, referring to its holding in State v. Bell (1976), 48 Ohio St. 2d. 270, which stated that relevant factors such as the defendant's age and prior criminal record are to be considered by the sentencing authority in determining the existence of mitigating circumstances. Further, the Ohio Supreme Court specifically construed and upheld R.C. 2929.04 (B)(2) relating to duress, coercion, or strong provocation, in State v. Woods (1976), 48 Ohio St. 2d. 127, and R.C. 2929.04 (B)(3), relating to psychosis or mental deficiency, in State v. Black (1976), 48 Ohio St. 2d. 262.

We find for the reasons set forth in the foregoing Ohio Supreme Court decisions, that the language of R.C. 2929.04(B) is not unconstitutionally vague. Appellant's sixth assignment of error is not well taken.

Appellant's assignment of error No. 8 is as follows:

> "VIII. THE LOWER COURT DEPRIVED THE APPELLANT OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO OBJECT TO THE PROPRIETY OF THE SEIZURE OF HIS PERSON BY RESTRICTING THE SCOPE OF INQUIRY INTO THE QUESTION OF WHETHER PROBABLE CAUSE EXISTED FOR HIS WARRANTLESS ARREST."

The test of whether probable cause exists for a warrantless arrest is stated in Beck v. Ohio (1964), 379 U.S. 89, 91, as follows:

> "Whether that arrest was constitutionally valid depends in turn upon whether, at the mement the arrest was made, the officers had probable cuase to make it-whether at that mement the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

See also Bock v. Cincinnati (1931), 43 Ohio App. 257.

The record of the pre-trial hearing indicates that the appellant was informed that he was under arrest after he had come to the police station and answered questions asked by Detective Howard. Although Detective Howard intended to arrest appellant from the time he first appeared at the station, he did not do so officially until after the initial interrogation. We find that at that time the information in Detective Howard's possession, including the identification of appellant by the victim's children as a visitor to the house on the night of the murder and appellant's denial of that visit, gave him probable cause to arrest appellant without a warrant. Further, we find no violation of appellant's rights in the trial court's limitation of testimony concerning probable cause at the pre-trial hearing, since only Detective Howard himself could relate what circumstances were known to him that led him to suspect the appellant. Appellant's assignment of error No. 8 is not well taken.

Appellant's assignment of error No. 9 is as follows:

> "IX. THE TRIAL COURT ERRED IN ITS REFUSAL TO ALLOW DEFENDANT TO INQUIRE INTO THE PROCEDURES UTILIZED BY THE LUCAS COUNTY PROSECUTOR'S OFFICE IN PRESENTING THE INSTANT CASE TO THE LUCAS COUNTY GRAND JURY. THE INQUIRY WAS TO HAVE BEEN LIMITED TO AN INVESTIGATION OF THE RATIONAL BASIS, IF ANY, DISTINGUISHING THE TREATMENT OF THIS APPELLANT FROM OTHERS SIMILARLY SITUATED."

Appellant alleges that the trial court erred in refusing to allow him to inquire into the Lucas County Grand Jury proceedings in other felony murder cases. Appellant contends that such an inquiry would have shown he was deprived of his constitutional right to equal protection under the law in that the Lucas County prosecutor had advised the grand jury of its right to return specifications only in his case of all the felony murder cases prosecuted up to that time since Ohio's new criminal code had become effective on January 1, 1974. The death penalty for aggravated murder is precluded unless the

indictment or a count thereof specifies one or more of the aggravating circumstances listed in R.C. 2929.04. See R.C. 2941.14 and R.C. 2929.04.

The United States Supreme Court in Gregg v. Georgia, supra, held generally that discretionary stages prior to the sentencing stage were not unconstitutional. In his concurrence in Gregg, Justice White expanded on that view as follows:

> "Petitioner's argument that prosecutors behave in a standardless fashion and decide which cases to try as capital felonies is unsupported by any fact. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which they jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless anymore than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. * * *"
> (903)

We find on the basis of the United States Supreme Court's dicta in Gregg that the exercise of prosecutorial discretion to return specifications in capital offense cases is constitutionally valid, and we further find no evidence that the prosecutor abused that discretion in the instant case. Therefore, appellant's ninth assignment of error is not well taken.

Appellant's tenth assignment of error is as follows:

> "X. THE TRIAL COURT ERRED IN REFUSING TO STRIKE THE FIRST SPECIFICATION OF EACH COUNT OF THE INDICTMENT ON THE GROUNDS THAT EACH SPECIFICATION IS PREDICATED UPON SECTION 2929.04(A)(5) PURPOSE, ALL IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I SEC. 16 OF THE OHIO CONSTITUTION."

R.C. 2929.04(A)(5) reads as follows:

> "(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment * * * and is proved beyond a reasonable doubt:
>
> "(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender."

Appellant contends that the words "an offense of which the gist was the purposeful killing of or attempt to kill another is unconstitutionally vague. We find nothing ambiguous or vague about this language. Appellant's assignment of error No. 10 is not well taken.

Appellant's eleventh assignment of error is as follows:

> "XI. THE OHIO DEATH PENALTY STATUTE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IN THAT THEY DENY THE CAPITALLY ACCUSED THE RIGHT TO A JUDGMENT OF HIS PEERS

AS TO THE EXISTENCE OF MITIGATING CIRCUMSTANCES, AND THE APPROPRIATENESS OF THE PENALTY OF DEATH AND THE TRIAL COURT BELOW ERRED IN DENYING DEFENDANT LONBERGER'S MOTION REQUESTING SUCH A JURY DETERMINATION."

Pursuant to R.C. 2929.03, the fact finder (either a jury or a three-judge panel) returns a verdict on the charge of aggravated murder and on any specifications of aggravating circumstances which are charged. If the defendant is found guilty of aggravated murder and of one or more specifications, there is a separate penalty proceeding conducted by the trial judge in a jury case or the same three-judge panel that convicted the defendant in a non-jury case. Following a pre-sentence investigation and psychiatric examination, and upon reports of those investigations plus any other evidence and arguments that are submitted by counsel, the sentencing authority determines whether any of the mitigating circumstances listed in R.C. 2929.04(B) exists. If the sentencing authority (either the trial judge or the three-judge panel unanimously) finds no mitigating circumstances, the defendant is sentenced to death; otherwise, he is sentenced to life imprisonment.

Appellant contends that in a case in which a jury trial is demanded, only the jury may be trusted to impose the death penalty in order to prevent excessiveness and disproportionality in capital sentencing. However, in upholding the Florida death penalty statute, under which the jury renders an advisory verdict but the trial judge actually determines the sentence, in Proffitt v. Fla. (1976), _____U.S._____, 49 L. Ed. 2d. 913, 923, the United States Supreme Court said:

> "This Court has pointed our that jury sentencing in a capital case can perform an important societal function, * * * but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since

> the trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

On the basis of the foregoing reasoning, we find that there is no constitutional requirement tht the penalty in a capital case be determined by a jury.

Appellant further argues that findings regarding the presence or absence of mitigating circumstances are findings of fact as to which the defendant has a constitutional right to trial by jury. Appellant argues that a criminal defendant is entitled to a judgment by his peers as to the facts that significantly effect the degree of his culpability. Appellant fails to recognize tha at the sentencing stage it is not culpability that is being determined. In State v. Woods, supra at 137, the Ohio Supreme Court stated:

> "The question at that stage is not guilt, for guilt has already been determined. * * * Rather, the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime."

Pursuant to R. C. Chap. 2947, sentencing in criminal cases is a function of the court, not of the jury. It is within the discretion of the court to impose sentence or to suspend sentence and place the defendant on probation. In determining whether to suspend a sentence, the court determines on the basis of testimony and reports whether the conditions set forth in R.C. 2951.02 exist. See R.C. 2947.06 and Crim. R. 32.2. We find no constitutional infirmity in authorizing a court which routinely determines the existence of specified mitigating circumstances in noncapital cases to do the same thing in capital cases. Appellant's eleventh assignment of error is not well taken.

On consideration whereof, the court finds that the defendant was prejudiced and prevented from having a fair trial in that the the verdict of guilty of the charge of murder while committing

rape is not sustained by sufficient evidence. It is hereby ordered, adjudged, and decreed that the judgment on the verdict of guilty of aggravated murder in violation of R.C. 2903.01(B) be and hereby is reversed, and that a final judgment of guilty of murder in violation of R.C. 2903.02 be and hereby is entered.

This cause is remanded to the Lucas County Common Pleas Court for sentencing of defendant pursuant to R.C. 2929.02 (B). Costs assessed against the appellee.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run. App. R. 22(E).

/s/ John W. Potter,
Presiding Judge

/s/ Clifford F. Brown,
Judge

/s/ Frank W. Wiley,
Judge

Judge Frank W. Wiley, Retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

WILEY, J., concurs. As to assignment of error No. 4, the evidence does sustain the jury verdict that it was the defendant that had sexual intercourse with the victim, but there is reasonable doubt that it was rape.

# Joint Appendix

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 81-420

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

R. C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
*Petitioner,*

v.

ROBERT LONBERGER,
*Respondent.*

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# ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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# JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED AUGUST 11, 1982**
**CERTIORARI GRANTED JANUARY 11, 1982**

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The following documents of the joint appendix have been reproduced in the appendix to the petition for writ of certiorari and are designated in the brief by reference (A_____).

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Petition for Writ of Habeas Corpus – filed December 14, 1977 (omitted from appendix).

Opinion and Order – filed December 7, 1978 (A-23), denying petition.

Order – filed October 19, 1979 (JA - 104), reaffirming denial of petition.

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*State v. Lonberger* No. 71-1554
(Cook County Circuit Court)

STATE OF ILLINOIS )
COUNTY OF COOK ) SS.

The May, 1971 Grand Jury of the Circuit Court of Cook County.

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinios, upon their oaths present that on August 25th, 1968 at and within said County Robert Lonberger committed the offense of aggravated battery, in that he, intentionally and knowingly, without legal justification, committed a battery on Dorothy Maxwell which caused great bodily harm to said Dorothy Maxwell in violation of Chapter 38, Section 12-4, of the Amended Illinois Revised Statutes 1965x 9, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

The Grand Jurrors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on August 25th, 1968, at and within said County Robert Lonberger committed the offense of aggravated battery, in that he, in committing a battery on Dorothy Maxwell used a deadly weapon, in violation of Chapter 38, Section-12-4, (b-1), of the Amended Illinois Revised Statutes 1965, 2, 7, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that

on August 25th, 1968, at and within said County Robert Lonberger committed the offense of attempt, in that he, with intent to commit the offense of murder, intentionally and knowingly attempted to kill Dorothy Maxwell by cutting Dorothy Maxwell / with a knife without lawful justification, in violation of Chapter 38, Section 8-4, of the Illinois Revised Statutes 1965, 7, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on August 25th, 1968, at and within said County Robert Lonberger committed the offense of aggravated battery, in that he, in committing a battery on Wendtian Maxwell used deadly weapon, in violation of Chapter 38, Section 12-4, (b-1), of the Amended Illinois Revised Statutes 1965, 67, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

/s/ Edward V. Hanrahan
State's Attorney

*State v. Lonberger* No. 71-1554
(Cook County Circuit Court)

NEW PG-1

STATE OF ILLINOIS ) CIRCUIT COURT
) SS. 11/70
COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT–CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS )
)
—vs— )
)
ROBERT LONBERGER )

INDICTMENT FOR: AGGRAVATED BATTERY, ETC.
General No: 71-1554

## CONVICTION STATEMENT

I, MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois, in said County and State and Keeper of the Records and Seal thereof do hereby certify that the Records of the Circuit Court of Cook County, County Department–Criminal Division, show that a Grand Jury as impanelled in and for the Circuit Court of Cook County, County Department–Criminal Division, for May, 1971; that the said Grand Jury returned into open Court an Indictment Number 71–1554, charging ROBERT LONBERGER the Defendant herein, with the crime of AGGRAVATED BATTERY, ETC.; that on June 7th, 1971, the Defendant and his Counsel GEORGE C. HOWARD, appeared for Arraignment before the Honorable JOSEPH A. POWER, Presiding Judge of the Circuit Court, County Department–Criminal Division, of Cook County, Illinois; that for his PLEA thereto the said Defendant pleaded to said Indictment that he was NOT GUILTY in manner and form as charged.

That on March 10th, 1972, the Defendant ROBERT LONBERGER, and his Counsel CONSTANTINE P. XINOS, appeared before the Honorable JAMES M. BAILEY, Judge of the Circuit Court of Cook County, Illinois, and WITHDREW his PLEA OF NOT GUILTY, heretofore entered herein and entered a PLEA OF GUILTY in manner and form as charged in the Indictment in this cause.

That the Court after having fully explained to the Defendant and before the entry of said PLEA OF GUILTY, the consequences of entering such PLEA OF GUILTY, the said Defendant still persisted in his PLEA OF GUILTY in manner and form as charged in the Indictment in this cause.

NEW PG–2 CIRCUIT COURT 11/70

and the said PLEA of Guilty was thereupon ordered by the Court to be received and entered of record in this Court.

And the Court after hearing evidence in the trial of this cause on March 10th, 1972, entered the JUDGMENT of the Court adjudging the said Defendant ROBERT LONBERGER, GUILTY of the said crime of AGGRAVATED BATTERY, ETC. in manner and form as charged in the Indictment in this cause.

The reupon on March 10th, 1972, the Defendant and his Counsel appeared before the Honorable JAMES M. BAILEY, Judge, and upon the said PLEA and JUDGMENT entered of record in this cause, he was

(a) SENTENCED to imprisonment in the ILLINOIS DEPARTMENT OF CORRECTIONS – JOLIET, ILLINOIS for a term of years not less than TWO (2) year(s), nor more than FOUR (4) years.

*State v. Lonberger* No. 71-1554
(Cook County Circuit Court)

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT–CRIMINAL DIVISION

THE PEOPLE OF THE )
STATE OF ILLINOIS )
)
vs. ) Indictment No. 71-1554
) Charge: Aggravated Battery,
ROBERT LONBERGER ) etc.

CHANGE OF PLEA

Report of proceedings had pursuant to the provisions of Chapter 38, Article 115-2, Illinois Revised Statutes, before the Honorable JAMES M. BAILEY, Judge of the Criminal Division, on the 10th day of March, A.D. 1972.

APPEARANCES:

HON. EDWARD V. HANRAHAN, State's Attorney,
By MR. JEFFREY M. RANDALL, and
MR. PATRICK J. McNALLY,
Assistant State's Attorneys,

appeared for the People;
MR. CONSTANTINE P. XINOS,
appeared for the Defendant.

THE CLERK: Robert Lonberger.

MR. XINOS: This is the defendant before the Court. Suppose to have a tonsillectomy today.

I would like to have a conference.

THE COURT: Do you know what a conference is? That means the State's Attorney, your counsel and myself will sit down and discuss certain things about your case. Thereafter, if everything is acceptable to all, a possible plea and disposition by way of guilty.

Understand that, sir?

THE DEFENDANT: Understand.

THE COURT: Knowing all this, and I am going to find out certain things about the case, as well as certain things about you I would not ordinarily find out at this time, knowing all this information, do you wish for us to have a conference?

THE DEFENDANT: Yes.

THE COURT: Understand after the conference, despite the fact I have this information, you will not be entitled to a substitution of Judges?

Understand that, since you agreed to the conference?

THE DEFENDANT: Yes.

[2]

THE COURT: All right. We will pass it for a conference.

[Whereupon after an interval of time the following proceedings were had, to-wit:]

THE CLERK: Robert Lonberger.

MR. XINOS: Mr. Lonberger is before the Court and desires to change his previously entered plea of not guilty to that of guilty.

Ready to proceed.

THE COURT: Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, you are pleading guilty, that you did on August 25, 1968, commit the offense of aggravated battery on one Dorothy Maxwell, and that you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you did on the same date commit the offense of aggravated battery on one Wendtian Maxwell, is that correct?

That is what you are pleading to, sir?

THE DEFENDANT: Yes, sir.

[3]

THE COURT: And understand by pleading guilty to this indictment you are waiving your right to a trial by this Court or trial by this Court and a jury?

Understand that, sir?

THE DEFENDANT: Yes.

THE COURT: You know the difference, in a jury trial the jury decides the facts and on a bench I decide the facts and the law.

Further waive your right to confront witnesses or any witnesses who desire to testify for you.

THE DEFENDANT: Understand.

THE COURT: Understand by pleading guilty I could sentence you from one to ten on the aggravated battery, and attempt one to twenty. So, I could sentence you to the penitentiary for a maximum of from one to forty years.

Understand that?

THE DEFENDANT: Yes, sir.

THE COURT: That is what I could do.

No promisses or threats made to you to get you to plead guilty with the exception of the results of the conference?

[4]

THE DEFENDANT: Yes.

THE COURT: What did Mr. Xinos say I would sentence you to on a plea of guilty?

THE DEFENDANT: One to seven.

THE COURT: Two to four?

THE DEFENDANT: Yes.

MR. XINOS: I said something about two to three.

THE COURT: And I said I wouldn't agree. And what did you and Mr. Xinos finally agree upon, two to four?

THE DEFENDANT: Yes, sir.

THE COURT: And no threats were made to you to get you to plead guilty, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: No other promises were made to you, is that correct, sir?

THE DEFENDANT: No, sir.

THE COURT: And that is the only thing actually offered to you, was two to four, is that correct, sir?

THE DEFENDANT: Yes, sir.

THE COURT: What do you wish to tell me insofar as stipulation and as far as facts concerned?

MR. RANDALL: Let it be stipulated by and between the parties, Indictment 71-1554, it is both sufficient

[5]

in law and in fact to sustain the charges contained therein, to sustain a finding of guilty on the charges involving Robert Lonberger.

Let it further be stipulated, venue lies in the County of Cook and State of Illinois.

MR. XINOS: So stipulated.

THE COURT: What do you wish to tell me in mitigation - - in aggravation?

MR. RANDALL: In aggravation the State would inform the Court Mr. Lonberger, June of '65, aggravated battery, sentenced minimum of two years and maximum of seven years.

In light of that, and the facts as Your Honor knows them through various conferences we had with the consent of Mr. Lonberger, the State would recommend a minimum of three years and maximum of eight years.

THE COURT: What do you wish to tell me?

MR. XINOS: How long have you lived in Chicago?

THE DEFENDANT: Twelve years.

MR. XINOS: Married or single?

THE DEFENDANT: Married.

MR. XINOS: Been in service?

THE DEFENDANT: Yes.

[6]

MR. XINOS: What kind of work do you do?

THE DEFENDANT: Dock Worker.

THE COURT: Union?

THE DEFENDANT: Yes.

MR. XINOS: What was the last time you worked?

THE DEFENDANT: January.

MR. XINOS: January, '71?

THE DEFENDANT: Yes.

MR. XINOS: And locked up after that?

THE DEFENDANT: Yes.

MR. XINOS: Up until that time you were steadily employed?

THE DEFENDANT: Yes.

THE COURT: Where did you spend the other time when you were in the penitentiary? What penitentiary?

THE DEFENDANT: Statesville.

THE COURT: At Joliet?

THE DEFENDANT: Yes.

THE COURT: Didn't you pick up a trade or anything while you were out there?

THE DEFENDANT: Yes. Spot welding. Making metal filing cabinets, putting filing cabinets together, cutting them down to the dimension they could be put together.

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THE COURT:Why didn't you do that work then you got out?

THE DEFENDANT: Well, at the time the places I went already had employees full and they put me on a call but they never did call me and went to the employment service where they found jobs but they was for college graduates even though, you know, you had - - if you had a trade it didn't make any difference. You had to be a college graduate. This was the rule.

THE COURT: College graduates as spot welders?

THE DEFENDANT: Filing cabinet makers. This is the way the union got it going, even though you might not know how to cut it down.

THE COURT: Let's hope when you are out there this next time you can basically improve on whatever trade, or else complete your education.

Control your temper so you won't be back before another Court.

Understand that?

THE DEFENDANT: Yes.

THE COURT: Maybe if you can control your temper and you work you won't have any problems.

THE DEFENDANT: Yes, sir.

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THE COURT: Can you do that for the sake of yourself?

THE DEFENDANT: Oh, yes, sir.

THE COURT: You don't want to keep going down there every couple years, do you?

THE DEFENDANT: No, sir, I do not.

THE COURT: There will be a finding on the plea.

The defendant will be sentenced to the Illinois State Penitentiary from two to four years.

Anything else to say?

THE DEFENDANT: Nothing but to thank the Court, sir.

THE COURT: Fine.

MR. XINOS: Judge, could I have an order approved for the bond?

Judge, this bond was never made to stand for this indictment. Could that be part of the order?

He was arrested on another charge and incarcerated and when he appeared before Judge Power, and as the arraignment will indicate, his family indicated he was out on bond so the Judge said, bring in the bond.

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THE COURT: What happened to the other charge?

MR. XINOS: That was all dismissed.

THE COURT: That was disposed of?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. We will make it part of the order.

THE DEFENDANT: I would also like to ask you, Your Honor, to give me a 90 day stay whereas I can get this operation taken care of where I can get good medical treatment whereas when you go to the joint - -.

THE COURT: They will work something out.

MR. RANDALL: It would be better if you made they stay because they push us for pen letters.

THE COURT: How long will the operation take?

THE DEFENDANT: Supposed to go up today so they was going to take me for the operation tomorrow or Tuesday.

THE COURT: How long?

I will give a stay of mittimus for thirty days.

MR. RANDALL: April 14?

THE COURT: How is that?

THE DEFENDANT: Good.

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THE COURT: You can go the day before my birthday.

[Which were all the proceedings had upon the change of plea in the above-entitled cause.]

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STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

I, ROBERT V. HANGSTERFER, Official Court Reporter of the Circuit Court of Cook County, County Department—Criminal Division, do hereby certify that I reported in shorthand the above proceedings had in the aforementioned cause, pending in said court on this date; that I thereafter transcribed into typewriting the foregoing transcript, which I hereby certify is a true and correct transcript of such proceedings had in said cause.

/s/ Robert V. Hangsterfer
Official Court Reporter,
Circuit Court of Cook County,
County Department—
Criminal Division.

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this issue today and continue it to the 30th or the 29th of the month and issue subpoenas for the people who may be required to rebut that testimony or to answer that testimony and present it immediately after the jury verdict is returned so we can go into that issue and be in a position to submit the specifications to the jury at that time.

Do you have your certified copy of your - -

MR. RESNICK: Yes, we do, Your Honor.

THE COURT: Do you want to put that in evidence at this time?

(Thereupon, State's Exhibit 1, a certified copy of a transcript; and State's Exhibit 2, being a transcript of a change of plea, were marked for identification by the Court Reporter.)

MR. RESNICK: If the Court please, the State will, at this time, introduce State's Exhibit No. 1 which is a certified copy of the conviction in Illinois showing a conviction on March 10, 1972, of the Defendant, Robert

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Lonberger, and State's Exhibit No. 2 which is a transcript of the change of plea made on the 10th day of March, 1972, and I believe that the transcript - - you have a copy of that, is that correct?

MR. ZEMMELMAN: Yes.

MR. RESNICK: And that by stipulation this can be considered by the Court because this is not certified by the Court. It is certified by the Court Reporter.

MR. ZEMMELMAN: I assume it's the same as ours.

MR. RESNICK: I assume it is, too. I received it from the State's Attorney.

You want to have the opportunity to check - -

MR. ZEMMELMAN: No.

THE COURT: Any objection?

MR. RESNICK: I assume - - just a moment.

I assume we could have one further stipulation that this Defendant is the same person mentioned there?

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MR. ZEMMELMAN: Yes.

THE COURT: What are your stipulations, that these exhibits be received in evidence at this time and that the Defendant mentioned in the exhibits is one and the same person who appears in Court this morning, is Robert Lonberger?

MR. RESNICK: Yes.

MR. ZEMMELMAN: Your Honor, our understanding - - we would stipulate that the Robert Lonberger - - the Defendant referred to in those documents is the same Robert Lonberger who appears here.

We would also stipulate, Your Honor, to part of State's Exhibit 1 and that is the part consisting of a two

page or a page and a half document known as Conviction Statement along with the certification because that's permitted by Statute.

However, another part of State's Exhibit 1 consists of an indictment, and that is not allowed under the Statute.

With respect to State's Exhibit 2,

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we have no objection to it being introduced, but we would want the Court to reserve its ruling on the admissibility until the Defendant takes the stand.

THE COURT: Proceed.

MR. RESNICK: Well, if the Court please, in regard to the objection of the indictment, the conviction statement refers to the indictment, and this was what was prepared at my request for preparation of a judgment of conviction and mailed to me.

THE COURT: Okay. You may proceed.

— — —

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— — — —

MR. CZARNECKI: Your Honor, we would like at this time to call Robert Lonberger.

THE COURT: All right. Thereupon, the Defendant,

ROBERT LONBERGER,

who, having been first duly sworn, according to law, testified on his oath as follows:

## DIRECT EXAMINATION

BY MR. CZARNECKI:

Q. Robert, I would like to call your attention to the date of March 10, 1971. Tell me if you can remember where you were on that day.

A. Judge Bailey's courtroom.

Q. I see. And why were you there?

A. I was down on aggravated battery.

Q. Okay. What was the purpose of that particular - - where is Judge Bailey's courtroom?

A. 26 North California, Courtroom 405.

Q. In?

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A. In Cook County.

Q. Chicago, Illinois?

A. Chicago, Illinois.

THE COURT: What is your name and address for the record, please?

DEFENDANT: 915 Heston, Robert Longerber is the name.

THE COURT: Okay. You are the Defendant in this case?

DEFENDANT: Yes, I am.

THE COURT: Okay.

Q. (By Mr. Czarnecki) All right, what was the purpose of that particular court appearance, Mr. Lonberger, on March 10, 1971?

A. The purpose when I first went up to go to trial but my lawyer came back in the bullpen and said the State had offered a deal.

Q. Who was your lawyer?

A. Constantine P. Xinos.

Q. Constantine P. Xinos?

A. Right.

Q. Had he been your lawyer all through the -- incidentally, when were you arrested on that

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particular charge if you remember?

A. '71.

Q. Okay. What was the date?

A. Around February the 7th if I'm not mistaken, somewhere along in there, or either -- I'm not too clear on --

Q. So, I would like to correct the record. I asked for the date of March 10, 1971. I intended to ask for March 10, 1972. Does that change your answer in any way?

A. Oh, March.

Q. We dropped a year originally.

A. Right; right; right.

Q. And you were arrested now you say in February of 1971?

A. Right.

Q. Which means that - - where were you between those two dates, February, 1971, and March 10, 1972?

A. In the Cook County Jail.

Q. Let's get back to our discussion. You had originally been scheduled for trial on March 10, 1972, is that your testimony?

A. Right.

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Q. What occurred on that date?

A. My attorney come back, told me that day we had come out front and the judge was going to say a whole lot of things and it was only just for part of the record. I go out and they tell me, say, well, they was going to have a conference on the case and then they told me that - - to go back into the back, so my lawyer advised me beforehand that this was only for the record sake, you know, that him and the State's attorney had already got together on the case.

Q. How often had you talked to Mr. Xinos before that date?

A. Once in the County Jail.

Q. He was your attorney for two years?

A. No, he wasn't.

Q. Or for a year and a half?

A. Yes.

Q. Who was - -

THE COURT: Wait a minute.

Q. (By Mr. Czarnecki) He had represented you all during - -

THE COURT: Wait just a minute. From 2-7-71 to 3-10-72 is 13 months, isn't it?

MR. CZARNECKI: Thirteen months,

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that's not a year and a half.

Q. (By Mr. Czarnecki) Had Mr. Xinos been your attorney all during that 13-month period?

A. No, he hadn't.

Q. Who was your attorney before that?

A. George C. Howard.

Q. How long was he your attorney?

A. From February to somewhere in the middle of the year, April, March, somewhere along up in there, August, I'm not quite sure.

Q. Okay. And what happened to your relationship with Mr. Howard?

A. Well, he got off the case through my asking him to.

Q. And Mr. Xinos then took over your defense?

A. Right.

Q. And you talked to him how many times before this date?

A. Once in the County Jail.

Q. Talked to him once in the County Jail before you tendered a plea?

A. Right.

Q. And you talked to him on March 10, 1972, and

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again what was your statement, what did he tell you you were going to be doing?

A. Copping out to aggravated battery.

Q. And what further did he tell you?

A. That he had talked it over with the State's attorney and that again we would go out and the judge would say a lot of things but it was just for the record's sake and that we was copping out to aggravated battery from two to four, that was the agreement.

Q. At any time did Mr. Xinos inform you that you were pleading guilty to attempted murder?

A. No.

Q. All right. At any time during the course of the proceedings in court, did anyone tell you you were pleading guilty to attempted murder?

A. No, I was only brought - - arrested on aggravated battery, brought before the court on aggravated battery, not attempted murder.

Q. And again, what was the sentence you were given?

A. Two to four on aggravated battery.

Q. Did the judge ever tell you that he was giving you multiple sentences; in other words, did he say

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anything about concurrent or consecutive sentences?

MR. RESNICK: Your Honor, we are going to object. I think the record speaks for itself.

A. Not that I remember.

MR. RESNICK: Just a minute.

THE COURT: Overruled.

I think the question - - it's a leading question and objectionable on that ground. This is your witness.

Objection sustained.

Q. (By Mr. Czarnecki) Let me go back to your relationship with Mr. Howard, Mr. Lonberger. You were indicted - - did you ever receive a copy of an indictment in Chicago?

A. No, I didn't.

Q. Did anyone ever - - I'm going to hand you what's been marked as State's Exhibit 1. Have you ever seen that document before?

A. No, I haven't.

Q. Has anyone - - did anyone ever read to you from the indictment?

A. No, they didn't.

Q. How many conferences did you have with

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Mr. Howard before he was discharged from your representation?

A. I talked to him one time.

Q. Did he ever tell you what the charges - -

MR. RESNICK: Objection; leading.

THE COURT: I haven't heard the question, but I'm assuming what the question is going to be. Appears to be somewhat leading in nature.

MR. CZARNECKI: May I complete the question?

THE COURT: Sure.

Q. (By Mr. Czarnecki) Mr. Howard ever tell you what the charges against you were specifically?

MR. RESNICK: Objection, leading.

THE COURT: No. Overruled.

MR. RESNICK: You can ask him what his conversations were and that would not be leading, and this is leading, Your Honor.

THE COURT: That's all right. I will let him answer.

A. No.

THE COURT: You have answered

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it?

A. Would you repeat the question?

MR. CZARNECKI: Would you read the question back?

(Thereupon, the court reporter read the last question.)

A. No, no more than aggravated battery. That's what he asked me about, what is this about this case on aggravated battery on one Dr. Maxwell.

MR. CZARNECKI: I have no further questions, Your Honor.

— — —

## CROSS EXAMINATION

BY MR. RESNICK:

Q. Mr. Lonberger, you recall being present in court immediately after a conference, have you not - - do you not?

A. Say what now?

Q. Do you remember being present in court when your lawyer was talking to you - - or the judge talking to you and saying that there was going to be a conference between the lawyers, the State's attorney and the judge?

A. Yes.

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Q. Do you recall that?

A. Yes, I remember.

Q. Okay. And after that conference you appeared in court, is that correct?

A. Right.

Q. Okay. Now, do you recall - - incidentally, this is a transcript of what occurred at that time. Have you had occasion to read this transcript?

A. No, I haven't had occasion to read it.

Q. Haven't your lawyers shown you that transcript?

A. No, they haven't shown it to me. They have asked me questions about it.

Q. They didn't let you read it?

A. No, wasn't necessary. I trust them.

Q. Well, I assume, Mr. Lonberger - - would you tell me if this is correct that the court advised you?

"In other words, you're pleading guilty that you did, on August 25, 1968, commit the offense of aggravated - - "

MR. CZARNECKI: Objection, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Resnick) - - "commit the offense of aggravated

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battery on one Dorothy Maxwell and that you did on the same date attempt on Dorothy Maxwell with a knife, is that correct?"

And you answered, "Yes, sir." Do you recall that?

A. Yes, I recall that.

Q. Now, you said that somebody told you the - - the lawyer told you that this is just going to be on the record and it didn't mean anything because you had a deal with the State, is that it?

A. Well, he said that this was the formalities.

Q. But it was just for the record?

A. Just for the record.

Q. Are you saying that the stuff that was just for the record really didn't mean anything because you had that deal?

A. Well, what I was under the impression of that what he was saying that this was what - - you know, that it was just being said for the record's sake and that I was up on aggravated battery and this is what could have been.

Q. You don't deny that the judge did tell you that you were also pleading guilty to attempt with a knife on Dorothy Maxwell as well as the aggravated battery, but

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you just thought it was - - that has to be said because you had your deal, is that what you're saying?

A. No, I'm saying he told me this was for the record's sake.

Q. Um-hum. But you do admit that you were advised that the judge also told you that on the same date that, "You attempted on Dorothy Maxwell with a knife, " and you answered, "Yes, sir." That's what you're pleading guilty to?

A. Yeah, this is what I answered.

Q. Okay. And the court further went on to ask you, "And on the same date you committed the offense of aggravated battery on one Wendtian Maxwell, is that correct, that is what you're pleading to, sir?"

And you answered, "Yes, sir."

A. Yes, I think I did.

Q. All right. So that your testimony on direct as to only pleading to aggravated battery against Dorothy Maxwell is not completely the truth, there was also a county for Wendtian Maxwell, was there not?

A. No, I can't say that.

Q. You did say so in open court, did you not?

A. It was said but it wasn't a fact as far as I

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was concerned because I never was.

Q. It wasn't a fact?

A. It was never brought to my attention.

Q. Okay. You do remember being asked by the court or told by the court that by pleading guilty to the indictment you were waiving your right to a trial by the court or a trial by jury?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. You said you understood that?

A. Yes.

Q. You did understand it?

A. I understood what he meant.

Q. Okay. And he asked you if you knew the difference between a jury trial and a trial by the bench, and that he advised you that you're waiving the right to confront witnesses, do you recall that?

A. Not in my mind I don't remember too much of that.

Q. If I told you that the record indicates this and you answered that you understand, would you deny that?

A. No, I wouldn't deny it.

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Q. All right. Do you remember the judge telling you the maximum punishment that you could get? Let me read it to you and you tell me if you remember the court stating, "You understand by pleading guilty I could sentence you from one to ten on the aggravated battery and attempt, one to twenty." Do you remember him saying that to you?

A. Yeah, but I was - - I remember that wording being said but, as I said before, this was only - - we was only - - my thing was only dealing with aggravated battery on Dorothy Maxwell.

Q. In other words, what you're saying that you thought that this was a farce, that this had nothing to do with what was going to happen, is that what you're saying?

A. Right. I'm saying that what I had been advised of and that was - -

Q. You thought they were playing games in the court-room, that you had the deal with the State's lawyer?

A. Did I have - - no, this is what the State had made a deal concerning the two to four.

Q. Okay. Did you hear the court say or ask you that no promises or threats have been made to you to get you to plead guilty with the exception of the results of

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the conference regarding the time involved?

A. Well, as my lawyer had advised me that I was supposed to say yes, that this was just for the - - to protect the court.

Q. Your lawyer advised you to say yes?

A. Right.

Q. Incidentally, what did you know about your lawyer, Constantine Xinos?

A. I had heard that he was a good public defender.

Q. As a matter of fact, he was written up in the Newsweek as one of the leading public defenders in the country, was he not?

MR. SEMMELMAN: Your Honor, I object.

THE COURT: Just a minute.

A. I don't know.

THE COURT: Did I hear something over here?

MR. CZARNECKI: No, Your Honor.

Q. (By Mr. Resnick) Were you aware of that?

A. No, I was not.

Q. But you did hear that he was a good public

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defender?

A. I have heard that.

Q. And is that one of the reasons you changed attorneys?

A. Not necessarily.

Q. When you were arrested in March, 1971, where did they take you?

A. Philmore Police Station.

Q. And how long were you in the police station?

A. Until the next morning or so, I guess. I done forgot really.

Q. Did they advise you what you were under arrest for?

A. Yes.

Q. Okay. And what did they tell you?

A. They told me that I was being - - aggravated battery on one Dorothy Maxwell was being filed on me.

Q. And incidentally, this happened in '68. Where were you immediately after the thing happened?

A. Living upstairs over her.

Q. In other words, you had remained in Chicago for three years before they found you, is that right?

A. Yes, and had been arrested before.

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Q. Um-hum. Now, when you were booked in the jail then that you were only told - - your testimony is you were only told that you were charged with aggravated battery on Dorothy Maxwell?

A. That is right.

Q. Do you know who that detective was?

A. No, not right offhand I don't.

Q. Okay. And did you make bond?

A. Yeah - - well, I got out but I didn't make bond on the case - - on the aggravated battery.

Q. How soon did you get out after you were arrested?

A. Well, let's see. I got out around - - around August, somewhere around in August.

Q. And how did you get out?

A. Well, it was another case pending before the grand jury and they found me not guilty and - -

Q. What other case pending before the grand jury?

A. It was something about murder case, a murder case.

Q. You were being held on two charges then?

A. Well, yes, I was being held on twice, two charges.

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Q. On two charges?

A. Right.

MR. CZARNECKI: Objection, Your Honor. What's the relevancy of this line of questioning?

MR. RESNICK: I'm getting up to it, Your Honor.

THE COURT: I think it gets to the question of whether or not he understood what was going on.

Q. (By Mr. Risnick) You were being held on another charge?

A. Um-hum.

Q. And that was a murder charge but that was no billed by the grand jury, is that right?

A. Right.

THE COURT: Who was the alleged victim in that case?

DEFENDANT: Let's see. I can't remember the name, Mirm or Merbell, or something like that.

THE COURT: Man or woman?

DEFENDANT: It was a woman.

Q. (By Mr. Resnick) Now, do you know what bond they let

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you out on?

A. No, I do not.

Q. You don't recall?

A. Oh, no. I wasn't let out on no bond.

Q. How did you get out?

A. The grand jury found a no bill.

Q. Okay. What about the charges that had been placed against you by Maxwell?

A. Well, the charges that had been placed against me, evidently they said it was a mix-up in it, anyway they re-arrested me on it.

Q. In other words, they released you by mistake?

A. I'm not saying it was mistake but it was no billed.

Q. That happens occasionally here too, but at any rate, you were re-arrested then?

A. Right.

Q. How long afterwards?

A. Couple days.

Q. Couple days?

A. Yeah.

Q. Okay. When did you go to court for arraignment, when did you first go to court after your arrest?

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A. I went the next morning, I went to court after they - -

Q. After they arrested you?

A. Right.

Q. And what did they do there?

A. They brought the case up and they said that the other case had been throwed out and they said there had been an indictment turned back on me concerning aggravated battery on one Dorothy Maxwell.

Q. Um-hum. Now, are you talking about the second time you were arrested - -

A. Yes.

Q. - - or the first time?

A. I'm talking about the second time.

Q. The second time?

A. Um-hum.

Q. What about the first time? You were arrested on the Dorothy Maxwell matter. Did you go to court the day after you were arrested?

A. No, I wasn't.

Q. How long was it before you went into court?

A. Oh, maybe a week.

Q. A week?

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A. Or two.

Q. And did you go into court though on that Dorothy Maxwell matter?

A. Right.

Q. And when did you first call Attorney Howard in, was it when you first go to jail or the next day or week latter?

A. He was in on the case from the prior case as well as this one too.

Q. I see. So you had retained Mr. Howard for the prior case and he just continued to represent you on the Dorothy Maxwell case, is that correct?

A. Yeah.

Q. Okay. Did he talk to you about the Dorothy Maxwell case after you were arrested for that?

A. He asked me what it was all about and asked me - -

Q. Okay. After you were arrested, did he go over any papers with you?

A. He come and asked me about - - he come into the County Jail and he asked me about what is this about, this aggravated battery on one Dorothy Maxwell.

Q. Did he go over any papers with you?

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A. No, he didn't.

Q. He didn't have any papers?

A. He had a briefcase but he didn't go into no papers.

Q. Okay. Did you give him any papers?

A. No, I didn't give him none.

Q. Okay. And you say you went into court approximately two weeks later?

A. Yes, somewhere in there.

Q. And what did you do in court that time?

A. Judge Hexner called the case in before him.

Q. Which judge?

A. Branch 44.

Q. What's the name of the judge?

A. I'm not quite sure, Hutchinson. Maybe I'm not pronouncing it right.

Q. Okay. What did they do at that time?

A. They called Dorothy Maxwell up before the court.

Q. What happened?

A. She gave her testimony.

Q. You mean you had a trial?

A. No, we didn't have no trial, just a hearing.

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Q. A preliminary hearing?

A. Yes.

Q. Okay. Now, prior to going into the preliminary hearing, did you enter a plea?

A. Prior to going into the preliminary hearing?

Q. Prior or at the preliminary hearing did you enter a plea?

A. Yeah, it was a plea entered.

Q. What did you enter a plea to?

A. It was a not guilty plea.

Q. A not guilty plea?

A. Right.

Q. And before you entered that not guilty plea, didn't somebody read the charges to you?

A. The judge read the charges, the charge, not charges, but charge.

Q. Thank you. But you recall the judge reading something to you?

A. Yes.

Q. And you recall entering a plea of not guilty?

A. Right; right.

Q. Now, the case went to the grand jury on Dorothy Maxwell sometime after that hearing, didn't it?

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A. Yes. He said he was going to bound the case over.

Q. Over the grand jury?

A. Right.

Q. Right. Now, how long did you wait before you heard anything from the grand jury?

A. Well, I never did hear anything from the grand jury.

Q. You never heard anything?

A. No, I didn't.

Q. Well, how did you know when the grand jury finally did something?

A. Because they called me up before the courts.

Q. Okay. And about how long was this after the preliminary hearing?

A. I don't know. I don't remember.

Q. Okay. And they called you up before the court and what did they tell you about the grand jury?

A. I was called in front of the chief justice and he asked what - - who was the attorney for the record, and the man over on the side told him George C. Howard.

Q. All right. And what else happened?

A. He sent me back in the bullpen. They tried to

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get in contact with Mr. Howard.

Q. All right. You say that was the chief justice there?

A. Yes.

Q. What was his name?

A. If I'm not - - Joseph, Judge - - I'm not quite sure. I don't quite remember his name.

Q. Okay. Did they locate Mr. Howard for you that day?

A. No, they didn't.

Q. Okay. When did Mr. Howard see you?

A. He seen me maybe two or three days later in the County Jail.

Q. Did you have to go back in court?

A. Yes, we went back in court.

Q. How long after you saw Mr. Howard did you go back into court?

A. Maybe two or three days.

Q. All right. And tell the court what happened then?

A. We come into the court - -

Q. What judge was it?

A. The judge? I don't know. He was the chief

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justice.

Q. Chief justice?

A. Right.

Q. Okay. Now, you're appearing in court with Mr. Howard. Go ahead, tell us what happened.

A. We walked into court. The judge assigned the case and sent it upstairs.

Q. Didn't he ask you how you plead?

A. He made no pleas there.

Q. You didn't enter a plea at that time?

A. Not that I remember.

Q. You don't remember?

A. I say I didn't make no plea then.

Q. Did your lawyer make a plea for you?

A. It was only arraignment to assign the case - -

Q. An arraignment?

A. Assign the case to a judge.

Q. What is an arraignment?

A. From my understanding to assign the case to a judge.

Q. But they didn't ask you to plead guilty or not guilty at that time?

A. Not that I remember.

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Q. You don't recall them reading what you were charged with at that time and asking how do you plead to those charges, Mr. Lonberger?

A. No charges was read there.

Q. They didn't read you any charges?

A. No.

Q. Okay. Now, up to that point, is it your testimony that you hadn't received any notice or papers showing what you were charged with?

A. No, I haven't.

Q. And it's your testimony that the arraigning judge did not read you those charges and ask you how you plead to them?

A. No, he did not.

Q. Okay. When did you next appear in court?

A. The same day in Judge Bailey's courtroom.

Q. What happened in front of Judge Bailey?

A. We were called out and the State's attorney read that aggravated battery on one Dorothy Maxwell.

Q. Is that all he read?

A. That's all he read.

Q. He only read one count of an indictment?

A. One count of an indictment.

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Q. Okay. And they aksed you how you plead to that?

A. Yes, they asked for a plea.

THE COURT: When was this, what date are we talking about?

DEFENDANT: I don't - - I don't really recall. All I remember in the span of time that we went to different courts. You would have to check - -

THE COURT: How far removed was it from the time you were secondly arrested? You were arrested, released, out a day or two and then brought back. How much later was it that you went before the chief justice and were sent to Judge Bailey?

DEFENDANT: Around September, I would say.

THE COURT: September, 1971?

DEFENDANT: Yeah, somewhere along in there.

THE COURT: Okay.

Q. (By Mr. Resnick) All right. Did you enter a plea at that time?

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A. Yes, it was a plea entered at Judge Bailey's courtroom.

Q. And in Judge Bailey's courtroom, do you know who the State's attroney was?

A. No, I'm not -- I don't.

Q. Um-hum. If I ask you if it was a Patrick McNally, would that mean anything to you?

A. Not really.

Q. Okay. Now, how long were you in court at that time, a brief period or a long period?

A. No, they just walk in there and they give you another court date and send you on out.

Q. All right. So you're telling the court now that they read the one aggravated battery count and you entered a plea of not guilty to that and then you sent back to jail?

A. Yes, went back to the City Jail.

Q. Did they assign a trial date?

A. No, they just set a court date.

Q. Was that Constantine Xinos at that time or was that Mr. Howard at that time?

A. That was Mr. Howard at that time.

Q. That was Mr. Howard at that time?

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A. Right.

Q. So it's your testimony that arraignment on the Dorothy Maxwell aggravated battery you still had Mr. Howard?

A. Right.

Q. All right. When is the next time that you went to court?

A. Well, I went to court three or four weeks straight but Mr. Howard was never there.

Q. You went to court three or four weeks straight?

A. Yes.

Q. What do you mean, every day?

A. Well, like maybe the next day I would go on the 5th or the 6th.

Q. What was done at that time, anything?

A. Nothing, because my attorney wasn't there.

Q. Um-hum. Was that what made you switch attorneys?

A. I wouldn't say that made me switch attorneys.

Q. What made you switch attorneys?

A. That is a personal matter.

Q. Well, what personal matter was it?

MR. ZEMMELMAN: Object, Your Honor.

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THE COURT: You may answer.

A. Well, I mean, you know, like I felt like he was getting a lot of pressure and had too many cases and he couldn't take care of mine.

Q. (By Mr. Resnick) Um-hum. So you got Mr. Xinos?

A. Right.

Q. Okay. You said Mr. Xinos interviewed you in the jail, right?

A. Right.

Q. Did you call him on the telephone or what?

A. Arrangement was made through a letter.

Q. Through a letter?

A. Right.

Q. Okay. And do you know if Mr. Xinos talked to Mr. Howard, if you know?

A. No, I don't, I don't know if he did.

Q. Okay. And Mr. Xinos then saw you at the jail. Did he ever make a court appearance with you other than the time of your final plea?

A. He might have. I don't remember.

Q. When was your case set for trial?

A. I think it was the 10th, the day that we made the deal, if I'm not mistaken.

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Q. You mean your case was set for trial on that day or had it been set on an earlier day?

A. It might have been set on an earlier day.

Q. Before March 10th, is that it?

A. Yeah, I imagine so before March 10th. I'm not quite sure on that. I don't remember.

Q. Okay. And on March 10th, do you recall these questions or these statements that I asked you, and you don't deny that they were said, you're not denying what's in here?

A. Well, I'm not going - - I'm not denying - -

Q. Would you please read - - you can read the whole thing.

A. That's all right. I don't have to read it.

Q. Well, I would like you to because I want to know whether you're denying anything that's in here.

A. I will say - - and I will say this, I'm not - -

THE COURT: Take your time and read it. You can't deny what you don't know. If you don't know what's in there, you can't deny it.

Q. (By Mr. Resnick) You read it.

A. Okay.

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THE COURT: Just take your time. We will take about a five-minute recess.

(Thereupon, a recess was taken at 10:50 o'clock a.m.)

– – –

11:03 o'clock a.m.

THE COURT: Did you have a chance to read that, Mr. Lonberger?

DEFENDANT: Yes, I have, Your Honor.

THE COURT: Okay.

Q. (By Mr. Resnick) Now, can you tell me if there's anything that you disagree with in here? is this what was said and is that how you answered?

A. That's what was said.

Q. And that is how you answered?

A. That is how I was advised to answer.

Q. Your lawyer advised you? In which particulars did your lawyer advise you to answer in a certain way, as to what questions?

A. As whatever the judge said, just go along with it.

Q. Just say yes?

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A. Yes, just say yes.

Q. You're not saying then when he asked you if you understand that he could sentence you from, what was it, he asked you, for instance, what does Mr. Xinos say I would sentence you to on a plea of guilty, and you answered, one to seven.

A. That was a mistake.

Q. That was a mistake?

A. Yeah.

Q. Why?

A. Well, I'm saying that was a mistake in what I had said because the court came right behind me and cleared it up.

Q. He cleared it up?

A. He said two to four.

Q. And you said yes?

A. Right.

Q. And that's what Mr. Xinos had told you, right?

A. Right.

Q. Okay. So to those particular questions, you understood that fully?

A. Yeah, I understood because we had talked about that.

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Q. Okay. Now, the court also told you, "No threats were made to you to get you to plead guilty, is that right?"

And you said, "Yes." Now, is that one of the questions where Mr. Xinos told you to answer yes whether it was true or not?

A. Well, sure. He said the judge would ask you was any threats or this would be made, you're supposed to say no. I mean I can't go out there and say yeah.

Q. I'm asking you now.

A. No.

Q. Is this the truth?

A. That's what was said.

Q. No. When you answered that question, were you telling the truth, had any threats been made to you?

A. No, hadn't none been made to me.

Q. Okay.

A. Right.

Q. No one coerced you?

A. Well, this was a deal. Yeah, in a sense there was a little coercion, right.

Q. Okay. So you're saying you were lying to the judge?

A. Yeah, in some senses I was.

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MR. ZEMMELMAN: Objection, Your Honor. It's not what was said. He's putting words in the witness' month.

MR. RESNICK: I don't think I'm putting any words in the witness' month.

THE COURT: Objection overruled. This is cross examination, isn't it?

Q. (By Mr. Resnick) The court asked you if any other promises were made to you. You answered, "No, sir." Were you telling the truth?

A. No other promises made other than the two to four.

Q. Okay. So you were telling the truth on that occasion, right?

A. Um-hum.

Q. That isn't something your lawyer told you to say truthful or not?

A. He just said to say yes on things when we go out into court to say yes, he give me an idea of what to say, you know.

Q. Okay. I'm sorry I have to go through this with you again but I don't know whether you were telling

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the truth or not, if this is one of the ansers or yes, that you were advised by your lawyer just to go along.

In regard to the statement by the court that you're pleading guilty and that you're waiving your right to a trial by the court or trial by jury and he asked you if you understood that and you said yes, were you lying or did you understand?

A. Well, maybe not in the full details, but yes, I stated I understood, right.

Q. Not only that you stated you understood, you really did understand. You know what waiver of a jury trial is?

A. Right, I understood what he meant about the waiver.

Q. Okay.

A. Right.

Q. All right. He also told you that you waive your right to confront your witnesses or any witnesses who desire to testify for you and you said you understood. Now, you understand that?

A. Yes, I understood what he said all right.

Q. So you were telling the truth there, right?

A. Sure.

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Q. Okay. He told you that, "You understand by pleading guilty I could sentence you from one to ten on the aggravated battery - -"

A. Um-hum.

Q. - - "and attempt, one to twenty, so I could sentence you to the penitentiary for a maximum from one to forty." He asked you if you understood that. You said, "Yes, sir."

Did you understand that or were you lying?

A. Well, now, I'm thinking that he's sticking one charge all in the same person.

Q. Did you understand that?

A. Yeah, I understood what he said.

Q. Okay. When you answered, "Yes, sir," you were telling the truth?

A. I understood what he said, right.

Q. Okay. And just a few more questions on this.

The court told you, "In other words, you're pleading guilty that you did on August 25, '68, commit the offense of aggravated battery on one Dorothy Maxwell and that you did, on the same date, attempt on Dorothy Maxwell with a knife, is that correct?"

You answered, "Yes, sir."

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Were you telling the truth that you understood what the court was saying or is this one of the lies?

A. Is this one of the lies?

Q. Yeah.

A. Well, I mean, I understood what he was saying that the aggravated battery was attempted, you know, so I was thinking it was all in one - -

Q. Um-hum.

A. - - you know.

Q. You're saying you really didn't understand what the court said?

A. Not that it was more than one charge, no, I didn't.

Q. Um-hum. Do you have any difficulty in reading that portion of it and recognizing that there's two charges there?

A. Not necessarily, no.

Q. Okay. And then he said to you, "And you did on the same date commit the offense of aggravated battery on one Wendtian Maxwell, is that correct?" You knew that was a separate charge, didn't you?

A. I understand what he was saying, but like I'm saying - -

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Q. Did you know that - -

THE COURT: Let the witness answer the question.

A. Do I know what now?

THE COURT: Proceed.

Q. (By Mr. Resnick) Do you know that you plead guilty to a count of aggravated battery on one Wendtian Maxwell?

A. No, I didn't.

Q. So when the court told you, "And you did on the same date commit the offense of aggravated battery on one Wendtian Maxwell, is that correct, that is what you're pleading guilty to, sir?"

And you said, "Yes, sir," what was going on in your mind when you said, "Yes, sir?"

A. Well, like I say, my lawyer had advised me that we was pleading guilty to aggravated battery - -

Q. Um-hum.

A. - - you know.

Q. And even though the court told you that there was an aggravated battery against one Dorothy Maxwell, that there was an attempt on the same date on Dorothy Maxwell with a knife, and that there was also an aggravated battery on one Wendtian Maxwell and you said you

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understood that is what you're pleading guilty to, you're telling me that this is just what your lawyer told you to say?

A. This is what we was - - this is what we was agreed to, aggravated battery, right.

Q. But would you answer my question?

A. Go ahead.

Q. You're telling me that's what your lawyer told you to say?

A. He told me - - he didn't tell me to say on that particular question but we was copping out to aggravated battery.

Q. But you heard the court mention three charges?

A. I heard what the court said.

Q. You rememberr that?

A. I remember what they was saying.

Q. Fine.

A. All right.

Q. So you know the court told you that there were those charges?

A. Not necessarily that it was on me, no, no I didn't? no, I didn't.

Q. You're not disagreeing with what's in this

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transcript?

A. I would disagree on that part because what I'm saying here, it was a deal made for aggravated battery.

Q. Yeah.

A. I was never confronted on no other charges and all the judge was saying is what could have been because this is the way he was talking to me. This is the way I felt that he meant.

Q. But didn't he say, "In other words, you're pleading guilty - -" That you did one, two, and three things?

A. No.

Q. And you said, yes, sir, twice, you said, yes, sir?

A. It's there but, I mean, this ain't the way - -

Q. Is that what happened?

A. This is the way - - this is what happened.

Q. Fine. All right. Now, Mr. Lonberger, that wasn't the first time you had ever been in court, is it?

A. That's not the first time I was ever been in court.

Q. You're fairly familiar with the court process, aren't you?

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A. Not really.

Q. In 1963, you appeared before Judge Strzalka on a charge of rape. What happened?

A. Well, they gave me 15 days for assault.

Q. Um-hum.

A. Say it wasn't no rape.

Q. Somebody read you a charge and asked you how did you plead, right?

A. No, that's what they call the boy's court. You go into boy's court.

Q. That was while you were a juvenile?

A. Yes.

Q. Um-hum. But you got 15 days in the House of Correction?

A. Yes.

Q. How old were you then?

A. I really don't remember.

Q. How old are you now?

THE COURT: How old are you now?

A. Twenty-nine.

Q. (By Mr. Resnick) Twenty-nine, and this is 12 years ago. You were 17?

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A. Maybe. I don't remember.

Q. Okay.

THE COURT: Well, wait a minute. Wait a minute. Did that take place in 1963?

DEFENDANT: Yeah, I'm quite sure it possibly did.

THE COURT: How old are you now?

DEFENDANT: I'm 29.

THE COURT: How far did you go in school?

DEFENDANT: I went to the ninth grade.

THE COURT: Can you add?

DEFENDANT: Yeah, I can add.

THE COURT: And subtract?

DEFENDANT: I can subtract.

THE COURT: Multiply?

DEFENDANT: I can multiply.

THE COURT: And divide?

DEFENDANT: And divide.

THE COURT: This is 1975.

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What's your birthdate?

DEFENDANT: The 3rd, 23rd of '45.

THE COURT: The 23rd of what?

DEFENDANT: March.

THE COURT: 23rd of March, 1945?

DEFENDANT: Um-hum.

THE COURT: Okay. So in 1963, do you have any idea how old you were?

DEFENDANT: Not right offhand, Your Honor - -

THE COURT: Well, here, I'll give you - -

DEFENDANT: - - to tell you the truth.

THE COURT: I will give you a piece of paper. What did you say?

DEFENDANT: I was about 17, I imagine 17.

THE COURT: Okay. Very good. Thank you.

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Q. (By Mr. Resnick) Okay. And that was - - was that your first court experience?

A. I don't know.

Q. You don't remember?

A. No, I don't remember.

Q. Okay. About three months later in March or May of '63, were you brought into court again - - you were 18 this time - - on a sex charge? Do you remember that?

A. Yes, I think I remember some feeling about that.

Q. All right. November, 1963 you were brought into court on a robbery charge. Do you remember that, Judge Epton?

A. No, I don't remember that.

Q. Okay. That case was eventually dismissed. Does that refresh your recollection?

A. No, it don't.

Q. Okay. In Vandalia, Illinois, the end of '63, battery, six months. Do you remember that?

A. Yeah, I remember that one.

Q. Do you remember being transferred to the penitentiary in Menard, Illinois?

A. Yes.

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Q. You were in court there. Did you plead guilty or did you go to trial or what?

A. The judge found me guilty.

Q. You went to trial?

A. Yes, we - - what they call just a trial, yes, standing before the bench.

Q. Okay. And in 1984 did you appear again in court, arrested by an Officer Wagner in the 10th District, aggravated battery, you were convicted and you did four months in the County Jail. Do you remember that?

A. Four months?

Q. Yeah. You were sentenced to four months. I don't know how much you did.

A. No, I don't remember that one.

A. When? In '64?

Q. Yeah, May of 1964, Judge Epton.

A. No, I don't remember that.

Q. Okay. 1965, February - -

A. Um-hum.

Q. Attempted rape, held for the grand jury. Do you remember being arrested for that? That was in February of 1965. Do you recall that?

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A. Yeah, I remember being arrested for it.

Q. For attempted rape?

A. No, it wasn't attempted rape when they arrested me.

Q. Okay. Also in February, 1965, you were picked up or arrested on an aggravated battery, is that correct?

A. Nineteen what?

Q. '65. You went to Joliet on that one I believe, is that correct?

A. 1965? Yeah, you're correct. I think two to seven on that one.

Q. Two to seven?

A. Right.

Q. What were you convicted of at that time?

A. Aggravated battery.

Q. What happened to the rape charge?

A. Wasn't no rape never on it.

Q. What about the attempted rape?

A. Wasn't - - that never was brought into court.

Q. How long were you in - - incidentally, was that aggravated battery tried or did you plead guilty?

A. No, that was tried.

Q. That was tried?

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A. Right.

Q. Okay. Was that the case where you got off the bus with this woman, incidentally, and all of a sudden started choking her?

MR. ZEMMELMAN: Your Honor, - -

A. No.

MR. ZEMMELMAN: Can I make a statement?

THE COURT: Sustained. The objection is sustained.

MR. ZEMMELMAN: May I make another objection, Your Honor?

THE COURT: What is the basis of the objection?

MR. ZEMMELMAN: I would like to object to the whole line of questioning. The Defendant had admitted that he has previously been in court. We have gone through about five or six episodes, half of which have been dismissed or nollied and he doesn't have a remembrance.

We admit he has a prior criminal record and he's been in court before and he

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said he was somewhat familiar with the court proceedings.

THE COURT: I think that's the whole point of this discussion, that is his familiarity with court proceedings, the charges against him, the nature of the charges, the disposition and so forth.

I think the inquiry is very proper and I think he is responding affirmatively that he does recall most of these things.

The objection will be overruled.

Q. (By Mr. Resnick) You were in Joliet then for three years, I think, two or three years, right, and you were discharged in 1969, right, from parole?

A. Somewhere along in there.

Q. Okay. October of '70 - - or December of '70, you were arrested again, disorderly conduct, resisting arrest and battery and you appeared before Judge Maher and you got one year probation. Did those involve guilty pleas or did you go to trial on those?

A. We walked before the bench, the judge asked us what's the case about - -

Q. Did you plead guilty or not guilty?

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A. Wasn't no plea entered.

Q. You didn't enter a plea?

A. No. See, what I'm saying, you got courts there they call branches. You walk before the court. The court - - when you walk up before the court, the judge asks you what the charge is, the nature of the charges. Each side give their opinion, he come up with a - -

Q. Each side does what?

A. Give their opinion. He comes up with a decision.

Q. The court never asked you whether you plead guilty or not guilty?

A. He don't ask you nothing like that. They have trial, what they call kangaroo courts.

Q. In Chicago - -

THE COURT: Where is this?

DEFENDANT: In Chicago.

THE COURT: Kangaroo courts?

DEFENDANT: Yes.

Q. (By Mr. Resnick) In February, 1971, you were picked up on a rape and murder. Is this the rape and murder that you were talking about that they no billed eventually?

A. Yes.

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Q. Okay.

A. That went through two process now.

Q. Okay. And then in April of '71 or May of '71 you were picked up on the Dorothy Maxwell and Wendtian Maxwell case, is that correct?

A. No, I was picked up on the Dorothy Maxwell case.

Q. Okay. And you were sentenced to two to four years on each count, each to run concurrently. Do you recall that?

A. No, I don't.

MR. RESNICK: If I may have one second, Your Honor.

(Discussion was had off the record.)

Q. Mr. Lonberger, I'm going to show you a document and ask you to look at it and read it and I think you will see at the top it says Circuit Court of Cook County. Would you read that aloud for us?

THE COURT: Where is the document, please?

MR. RESNICK: An indictment.

A. It says grand jury, sworn, selected - -

MR. ZEMMELMAN: Your Honor, could

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we object? It speaks for itself.

THE COURT: I will let him read it.

A. To the grand jurors chosen, selected, sworn in for the Cook County - - for the County of Cook and the State of Illinois, in the name and by the authority of the people of the State of Illinois, upon their oaths present that on December 24, '54 and within said county, Robert Lonberger, presently of the age of 14 years and upward committed the offense of attempted rape and that he, with the intent to commit an offense of rape, attempted to - - what is that word?

Q. (By Mr. Resnick) Compel.

A. Compel one Luroyal - - I don't know what that is either.

Q. Luroyal.

A. Luroyal Solomon, a female, not his wife, to submit to an act of sexual intercourse by force and against her will in the violation of Chapter 38, Section 84 of the Illinois Revised Statutes, 7th of 1963.

Q. Okay. Now then it goes on, contrary to the Statutes and against the peace and dignity of the people of the State of Illinois, right?

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A. Um-hum.

Q. Okay. Now, we that also answer the same title, December 24th, Robert Lonberger committed the offense of aggravated battery and that he intentionally and knowingly, without legal justification, committed a battery on Luroyal Solomon which caused great bodily harm to said Luroyal Solomon in violation of Chapter 38, Section - - and it goes on like the rest. Now, I want to ask you one question.

Have you ever seen that document before, not this particular one but a copy, have you read one like that before?

A. No, I didn't receive that either.

Q. You never got a copy of that indictment either?

A. No.

Q. You never read it?

A. No, but the lawyer have.

Q. Pardon?

A. The lawyer, the public defender had it.

Q. Did he read it to you?

A. No, he didn't.

Q. He never read it to you?

A. No, he didn't.

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Q. So you never got a copy of the indictment, you never had your lawyer read you the copy of the indictment, and the court never read you a copy of the indictment?

A. They read a copy, Fitzgerald read a copy of what he pulled me up, aggravated battery on Dorothy Maxwell - - I mean Luroyal Solomon, right.

Q. Now, you just corrected yourself, Mr. Lonberger. You said no one ever read anything to you. You said that somebody - - may I have the name of the person that he mentioned?

MR. ZEMMELMAN: Fitzgerald.

A. Fitzgerald.

Q. (By Mr. Resnick) Fine. Read somthing to you?

A. Right.

Q. He said - - I think you said he read you the charge of aggravated battery?

A. Aggravated battery, right.

Q. Why didn't you tell us that before?

A. This was during - - you asked me before - - what I'm speaking about, I'm picturing in my mind you mean before we go to trial. When we go up to go to trial on this particular day, he say, now the court is going to

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this section, that he was going to be tried by a jury, Robert Lonberger, aggravated battery.

Q. What did he read to you?

A. I don't know what he read. He read off a piece of paper on his desk.

Q. Did he read to you something like this?

A. I didn't see the paper.

Q. Now, at any time did you discuss it with your lawyer as to all the charges that you were charged with?

MR. ZEMMELMAN: Which time are we talking about?

Q. (By Mr. Resnick) The last time, Dorothy Maxwell, right before you went up to Judge Fitzgerald.

A. Judge Fitzgerald?

Q. Yeah.

A. You got this crossed up now, man.

Q. This is the 1964 case?

A. I thought we were talking about the case you just got through reading to me.

Q. The 1964 case then. That was Judge Fitzgerald and he did read something to you?

A. At the time we was getting ready to go to the jury.

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Q. Fine. Did he read to you what you just said?

A. No, he didn't read. He read aggravated battery.

Q. That's the only thing he read?

A. That was the only thing he read.

Q. But did he read the aggravated battery that you just read?

A. I don't know. All I know I remember him saying this is the case now coming before the court is aggravated battery.

Q. Okay. And in the case against Dorothy Maxwell, you had never seen a document, never have discussed a document, never have been read a document that appeared like that, is that correct?

A. No, I haven't.

Q. Okay.

MR. RESNICK: Where is one, State's Exhibit 1?

MR. ZEMMELMAN: I think Your Honor has it.

Q. (By Mr. Resnick) Now, your defense attorney asked you some questions about this, and I just want to get it on the record.

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Is it your testimony that you have never seen that before or a paper identical to it, not that this would be the same one that you saw?

A. What, on this case? No, I never have received a paper on this.

Q. Okay. You never saw that you were - - a paper that you had been charged with aggravated battery causing great bodily harm on Dorothy Maxwell?

A. No more than this - -

Q. No indictment?

A. No, no indictment.

Q. Okay.

A. No indictment.

Q. You didn't get an indictment of committing a battery against Dorothy Maxwell using a deadly weapon, you never got that indictment?

A. Never got that.

Q. You never got an indictment charging the offense of attempt to - - with intent to murder, intentionally, knowingly, attempted to kill Dorothy Maxwell by cutting her with a knife, you never got a copy of that?

A. No. Say attempt to kill there? No. It says the offense of attempt. Yeah.

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Q. You understand that means attempt to kill?

A. No, not necessarily.

Q. Why did you just say so?

A. I'm just saying that - - I'm just saying what it reads there. You said murder though.

Q. Okay. You never received a copy of this one either?

A. No, I didn't.

Q. Okay.

A. Never received none of those.

Q. Never seen none of the copies of any of those papers?

A. None ot those papers at all.

Q. Are you also telling the court that if the records in Chicago show that you were served with a copy of that indictment or those were read to you, that those records would be in error, is that what your testimony is?

A. I would say that.

Q. Okay.

MR. RESNICK: No further questions.

— — —

## REDIRECT EXAMINATION

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BY MR. CZARNECKI:

Q. I would like to clarify a couple things. The prosecutor asked you, Robert, when this offense occurred against Dorothy Maxwell. Do you recall that, the date?

A. Well, when I was arrested, I come to find out that she filed a complaint in August of - - August of 1968.

Q. And you were arrested again you said, what was the date of your arrest?

A. '71.

Q. Where you living between 1968, August 25th and '71 at the time of your arrest?

A. I lived over Dorothy Maxwell from August to September and from September I moved over on -- over on Douglas and Ridgeway.

Q. You lived over Dorothy Maxwell. Would you explain that, please?

A. Dorothy Maxwell lived downstairs and it's a beauty shop in front and I lived upstairs which is a whole --

Q. In the same building?

A. Yeah, the same building.

Q. And you were in Chicago. Were you residing in Chicago all that period between August, 1968, and

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March of 1971?

A. Yes, I were.

Q. Now, at the preliminary hearing you testified that Dorothy Maxwell testified. What was the substance of her testimony; did she in fact testify that the aggravated battery had been committed with a knife?

A. No. She come into court and she testified, she said that I had cut her baby and jumped on her to them

extent. I'm not - - I remember that clearly, and the court asked her whereabout and she said on the back or somewhere and they unbuttoned her blouse, the girl's blouse and went through some changes and the judge say, do you see anything, and the State's attorney and them say they couldn't see nothing to that extent, and they buttoned her blouse back up and he sat down and listened to some more of what she had to say.

He said, well, I'm going to continue this aggravated battery and he sent me back.

Q. Is it true that you were arrested once, at least once between August of 1968 and March of 1971 by the Chicago Police Department?

A. Yes, I were.

Q. That is what you reflected on your criminal

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record. Did you have any other contact with the Chicago Police Department between August 25, 1968, and March of 1971?

A. I think traffic tickets, here and there.

Q. I want to be clear. When you and Mr. Xinos went into court, did he give you a script?

MR. RESNICK: Objection; leading.

THE COURT: Sustained.

Q. (By Mr. Czarnecki) When you and Mr. Xinos sent into court, what were his instructions to you, please?

A. His instructions was to me was that when we go in here to that court, he say the first time we going to say we having a conference because me and the State's attorney have already gotten together, that the judge is going to go along with the State's attorney and me and whatever, this is all just for the record's sake, to keep the court in a certain bound, you know, where it won't show no reflection on them, and when we go back out there, out there, he will call you out and they say these things and he will call you back and then call a couple more cases and call you back out.

When I come back out there, whatever the judge say, yes, sir, no, sir, I understand, sir, you know, and

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things of that nature, and then don't worry, we getting two to four for aggravated battery and that was it.

Q. You have read this transcript, Mr. Lonberger?

A. Um-hum.

Q. Handing you State's Exhibit No. 2.

A. Um-hum.

Q. You open that transcript to page number three. In the middle of the page, the court begins by saying, "In other words - -" would you read that page to me, please?

A. "In other words, you're pleading guilty that you did on August 25th, 1968, commit the offense of aggravated battery on one Dorothy Maxwell and

that you did on the same date attempt on Dorothy Maxwell with a knife, is that correct, yes, sir."

Q. Okay. Mr. Lonberger, what was your understanding at that time as to what it was the judge meant when he said you did attempt on Dorothy Maxwell with a knife?

A. I thought he was just talking about the aggravated battery and that, you know, this was what she was saying, the statements that she had said, you know.

Q. Now, answer this question if you can. Do you know if it is possible to be convicted of aggravated

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battery in Illinois arising out of an attack upon someone with a weapon?

MR. RESNICK: Your Honor - -

THE COURT: Sustained. I take it you mean to object?

MR. RESNICK: Yes.

THE COURT: All right.

MR. RESNICK: Although it might be a good indication it was legal knowledge, Your Honor - -

MR. CZARNECKI: We were investigating that at some length and I wondered what his familiarity with the offense of aggravated battery was.

THE COURT: I think you're asking him to state a conclusion of the law of the State of Illinois, and I think that might be difficult, even for legal scholars.

The objection is sustained. Let's move to the next question.

Q. (By Mr. Czarnecki) Mr. Lonberger, when Dorothy Maxwell testified at the preliminary hearing about the occurrence that gave rise to these charges, is this all one

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transaction, is that her testimony, the attack upon her and her daughter and - -

A. Yeah, all this was in one testimony.

Q. Well, now, that's not precisely what I asked you.

Was her testimony to the effect that this - - your transaction with her and her daughter was all one; I mean it didn't occur at different times or in different places - -

A. No.

Q. - - did it?

A. No, it was all at one time.

MR. CZARNECKI: I don't have anything else, Your Honor.

— — —

## RECROSS EXAMINATION

BY MR. RESNICK:

Q. Isn't it a fact that after April 25, 1968, you left that apartment where you had been living below?

A. Living below? I was living upstairs.

Q. Above. Above Dorothy Maxwell? You left, didn't you?

A. No, I never left.

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Q. You never left?

A. Never left.

Q. Who were you living with?

A. I stayed upstairs with my mother.

Q. Was there a Thomas Ernest?

A. Yes, that's my brother.

Q. Your brother. Was he there?

A. Yes, he was there too.

Q. Okay. Do you know that your brother told the police that he hadn't seen you since that date?

A. No, that's impossible.

Q. That's impossible?

A. Right, because me and him was together all the time.

Q. Okay. You don't argue that you were finally charged with this offense in 1971 when you were picked up on a traffic violation, that you agree to, don't you?

A. That I was picked up on a traffic violation?

Q. Yeah.

A. No, that ain't the way that offense come about, that ain't the way - -

Q. I mean in 1971 you were finally picked up on a traffic violation and that's when they charged you with

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this aggravated battery, etcetera, against Dorothy Maxwell?

A. No.

Q. Okay. Did you move to some place else after this incident with Dorothy Maxwell happened?

A. Well, after the incident, her mother decided that, you know - -

Q. Whose mother?

A. Dorothy Maxwell's mother.

Q. Yeah.

A. Came up and talked to us and said she didn't want to have no more confusion over there and asked us, you know, would we kindly move, so that was in September, we moved.

Q. In September?

A. Right.

Q. In other words, this happened the 25th of August and sometime in September, a month later - -

A. Yes.

Q. - - the mother asked you to move?

A. Right.

Q. Okay. In other words, you're saying that after the 25th of August you remained living in that apartment for a month?

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A. Right.

Q. That same apartment?

A. That same apartment.

Q. Um-hum. And then you did move at the request of the mother?

A. Well, she talked to my mother and we all decided we would move, right.

Q. Okay.

MR. RESNICK: Nothing further.

THE COURT: Do you have any idea what we are doing here this morning?

DEFENDANT: No, I really don't. I get the impression that the State wants to use the prior conviction as to put before the jury as he try me on this case. That's what I gather, you know.

THE COURT: So what are we doing this morning?

DEFENDANT: Well, I guess you're trying to make a determination of whether you're going to let them do it or not.

THE COURT: For what purpose or how would I come to that conclusion?

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DEFENDANT: I guess from - - I really don't know, really to tell the truth. No more than you taking under advisement what I have said and what my lawyers have to say, and I guess what he have to say.

THE COURT: Why are you testifying this morning; what is the purpose of your testimony this morning?

DEFENDANT: Well, I feel that my testimony is to show that even though the case is set up in one fashion, it's saying one thing that I wasn't aware of it and that it never was brought to my attention that any other charges was involved but aggravated batter from the time that I went - - started - - went to court.

THE COURT: Are you suggesting that you were in custody from February of 1971 until March of '72 and you didn't know the nature of the charges against you?

DEFENDANT: Nothing but aggravated battery.

THE COURT: And you had two

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lawyers?

DEFENDANT: Right.

THE COURT: Mr. Howard and Mr. Xinos?

DEFENDANT: Right.

THE COURT: And nobody ever told you what you were there for?

DEFENDANT: Nothing but aggravated battery.

THE COURT: And you stayed for eleven months - - for thirteen months without knowing what you were charged with?

DEFENDANT: Nothing but aggravated battery.

THE COURT: I see. On who?

DEFENDANT: On one Dorothy Maxwell.

THE COURT: They never told you about the other person?

DEFENDANT: No, wasn't no other person ever brought to me.

THE COURT: Wasn't there also a charge on some man or some other woman?

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MR. RESNICK: Child.

THE COURT: A child? They didn't tell you anything about the child?

DEFENDANT: Well, I went to the inquest on that myself, you know.

THE COURT: You were aware that there was some - - were you aware of the fact that some charge was pending against you arising out of some involvement on your part with the child?

DEFENDANT: Not involvement with my part, just somebody they picked up and said it was the man.

THE COURT: Oh.

DEFENDANT: Until I was cleared through - - why her people that was involved, that was involved on the scene.

MR. RESNICK: The Defendant is talking about another incident.

THE COURT: He's talking about another incident.

DEFENDANT: That's what he was talking about.

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THE COURT: I am talking about this incident. You're telling me you were in custody from February of '71 until March of '72, is that correct?

DEFENDANT: Right.

THE COURT: Is that what you testified to previously?

DEFENDANT: Yes. I was out for a brief moment.

THE COURT: For two days. We won't count the two days, but you were in custody for thirteen months almost?

DEFENDANT: Right.

THE COURT: Approximately?

DEFENDANT: Right.

THE COURT: And you didn't know what you were being held for?

DEFENDANT: I knew that I was being held for aggravated battery.

THE COURT: On who?

DEFENDANT: On one Dorothy Maxwell.

THE COURT: And how did that

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arise, what did that arise out of?

DEFENDANT: Well, in March of - - in February I was arrested on a murder and we went through the process - -

THE COURT: I'm talking about - - I'm not concerned about that. I'm concerned about the incident involving this girl.

DEFENDANT: Well, what you mean now? Repeat your question again because I done got kind of - -

THE COURT: The question was, what were the circumstances out of which you were being held for that period of time? You didn't know what you were being held for?

DEFENDANT: Aggravated battery.

THE COURT: All right. Now, what were the circumstances of the aggravated battery?

DEFENDANT: The circumstances of the aggravated battery that I come to find out was just what she had testified into court.

THE COURT: Well, what was that?

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DEFENDANT: It was that she stepped into court and said - - well, first of all, Your Honor, what I'm trying to say is that I was picked up on an aggravated battery warrant on one Dorothy Maxwell - -

THE COURT: We have gone through that rather extensively.

DEFENDANT: All right, but - -

THE COURT: The question I have to ask you is, if you stayed in jail thirteen months and you want me to believe that you didn't know what you were in there for, is that right, other than the offense of aggravated battery on Dorita Maxwell - - is that her name?

DEFENDANT: Dorothy.

MR. RESNICK: Dorothy.

DEFENDANT: Right, that's what happened.

THE COURT: I see. No one told you about any other charges?

DEFENDANT: No one told me about any other charges.

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THE COURT: And you're saying to me you didn't know what this attempt was all about, no one ever explained to you about what this attempt was all about?

DEFENDANT: No, didn't no one ever explain that.

THE COURT: No one ever told you anything about that? No one told you about that?

DEFENDANT: I didn't hear until the judge told me at the time he was sentencing me.

THE COURT: None of the preliminary hearings this didn't come up?

DEFENDANT: None at the preliminary hearing.

THE COURT: Didn't come up at all?

DEFENDANT: Didn't come up at all.

THE COURT: Huh? How well educated are you? You read well.

DEFENDANT: Well - -

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THE COURT: You're able to figure out your age with a little computation here. You can read and write, understand the English language, right?

DEFENDANT: To some extent.

THE COURT: Don't have sany difficulty with it? You understood everything that went on here today, is that right?

DEFENDANT: By word, but maybe not in legal terms.

THE COURT: You responded to every question that was asked and you responded very intelligently, right?

DEFENDANT: Tried to.

THE COURT: No hesitation or reservations, is that correct?

DEFENDANT: I understand what you're saying. I don't know how you're saying that. I don't know how to take that.

THE COURT: We have all been here this morning. Your lawyer has asked questions.

DEFENDANT: Yeah.

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THE COURT: The prosecutor has asked questions.

DEFENDANT: Right.

THE COURT: I have asked questions.

DEFENDANT: Right.

THE COURT: You have responded.

DEFENDANT: Right.

THE COURT: Okay. Do you understand the nature of the proceedings here today, is that correct?

DEFENDANT: I think so.

THE COURT: Did you receive a copy of the indictment in this case?

DEFENDANT: Yes, I did.

THE COURT: Do you know what you're charged with?

DEFENDANT: Two counts of aggravated murder.

THE COURT: Right. There are some specifications along with those counts, aren't there?

DEFENDANT: Yes.

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THE COURT: What are they?

DEFENDANT: Specification about a prior conviction.

THE COURT: And what else?

DEFENDANT: I'm not quite - - I can't remember right now.

Attempted murder, one, this is one of them, right. Oh, and the other one is rape, specification two.

THE COURT: Okay. So you received a copy of this instrument?

DEFENDANT: Yes, I have.

THE COURT: And you have read it?

DEFENDANT: Right.

THE COURT: And you understand it?

DEFENDANT: Yes, I understand it.

THE COURT: And you understand the nature of the proceedings this morning?

DEFENDANT: Yes.

THE COURT: I didn't keep an

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accurate count, but the indication was that you had a lot of prior court experiences, is that correct?

DEFENDANT: Well, I have had a lot of experience what you would say maybe in just what we call the district courts but not really in no big top court.

THE COURT: This is a district court here. It is similar to the district court over in Cook County.

DEFENDANT: Well, no, what I mean about a district court means the ones out in the neighborhoods.

THE COURT: I see.

DEFENDANT: They handle what they call misdemeanors and stuff like that.

THE COURT: I see.

DEFENDANT: I have been in to them quite often, but never in to - -

THE COURT: How many court appearances would you say you have made in your lifetime?

DEFENDANT: I couldn't answer

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that, Your Honor, really, but I would say right offhand that I can remember at least five or six times.

THE COURT: How many different lawyers did you have represent you along the way?

DEFENDANT: Well, I have never been able to afford but one attorney or two and all the rest of them has been the public defender that be standing by the bench.

THE COURT: I see. By reason of your experience along - - or the period of confinement that you have had given to you over a period of time, would you not be concerned about knowing what you're pleading guilty to and how long you're going to stay away and what you're admitting that you did?

DEFENDANT: Well, I imagine that one would, you know, if he would, you know, really was versed on what he was doing, but like, again, I'm saying is that usually common thing in Cook County is that the State make a deal and they go about it, you know, where they

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get rid of the court docket, get rid of the load of the cases.

They come in and say we give you a deal here and do this or we'll do that and usually they be making a deal, just making deals to - - for reduced charge - -

THE COURT: But it involves your liberty.

DEFENDANT: It involves my liberty.

THE COURT: Right.

DEFENDANT: But like I'm saying, I'm thinking it's aggravated battery and my lawyer is talking about aggravated battery. He's not talking about attempted murder or aggravated battery on no one else. He's just talking about aggravated battery on one Dorothy Maxwell.

THE COURT: Okay. I have nothing further. Anything else by counsel?

You say you went to the ninth grade?

DEFENDANT: Yes.

THE COURT: Where?

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DEFENDANT: Criter.

THE COURT: Where is that located?

DEFENDANT: On Roosevelt and Woods, around seventeen hundred, somewhere along in there.

THE COURT: In Chicago?

DEFENDANT: Yeah.

THE COURT: Did you get any additional education in any of the institutions you might have been in?

DEFENDANT: Well, no, due to the fact that they was overcrowded, most of them that I was in.

THE COURT: No training programs or anything like that?

DEFENDANT: Sheet metal making, filing cabinets and a few other things.

THE COURT: No classroom experience?

DEFENDANT: No, no classroom experience.

THE COURT: Okay. Anything

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further?

MR. RESNICK: Nothing further. Your Honor.

MR. ZEMMELMAN: No, Your Honor.

MR. CZARNECKI: Nothing.

THE COURT: All right. We will continue this hearing to May the 29th.

MR. RESNICK: That's a Thursday, Your Honor.

THE COURT: Sure, Tuesday, Wednesday, Thursday. You want the 30th? Doesn't make any difference to me, but I think it ought to be at this point.

MR. ZEMMELMAN: May I ask a question, Your Honor?

THE COURT: Certainly.

MR. ZEMMELMAN: The Court is continuing the hearing on the motion?

THE COURT: Yeah.

MR. ZEMMELMAN: Okay.

THE COURT: Sure, this branch of the motion.

Do you have any further evidence to

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*State v. Lonberger* No. CR75-5310
(Lucas County Court of Common Pleas)
(Ruling Upon Motion to Dismiss Death Penalty Specification)

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

STATE OF OHIO, )
)
—vs— ) No. CR 75-5310
) **COURT ORDER**
ROBERT LONBERGER,)
Defendant. )

— — —

5/16/75 Case called for hearing on the branches of defendant's motion to dismiss not previously ruled on by the Court. Also set for hearing this date is the defendant's motion to limit the introduction into evidence of certain photographs prepared by the prosecution and the defendant's motion for a transcript of the hearing on defendant's motion to suppress. Case also heard on the prosecution's oral motion to limit certain alibi testimony on behalf of the defendant.

On the motion to dismiss the rulings of the Court are as follows:

Branch 1. As to that portion of Branch 1 of the defendant's motion to dismiss which relate to the unconstitutionality of the death penalty on the grounds that the County Prosecutor must exercise discretion in determining in which cases he should seek specifications in presenting aggravated murder cases to the Grand Jury, that portion of Branch 1 of the defendant's motion to dismiss is found not well taken and is hereby overruled.

The Court finds from the evidence that the Prosecutor did in fact use discretion in deciding that he should seek specifications in presenting this aggravated murder case to the Grand Jury. The Court further finds that over twenty aggravated murder cases have been presented to the Grand Jury prior to the presentment in this case, that this case is the first one in Lucas County under the 1974 Criminal Code of Ohio in which specifications were sought by the Prosecutor and charged by the Grand Jury. The Court further finds that the Prosecutor is allowed discretion in making many decisions in the proper operation of his office and in the performance of his duties. The fact that he exercised discretion in this case does not per se make the death penalty unconstitutional as applied to the facts of the instant case.

Branch 2. As to Branch 2 of defendant's motion to dismiss, the motion to strike Specification 1 of the first count of the indictment and Specification 1 of the second count of the indictment are found not well taken and are hereby overruled.

It is elementary that the defense can prohibit the State from introducing evidence of the alleged prior convictions except for the purpose of showing motive, intent, lack of mistake, or of the defendant's scheme, plan or system as provided for in the Similar Acts Statute, ORC 2945.29, or for the purpose of rebutting testimony on behalf of the defendant tending to show the good character of the defendant, or for the purpose of attacking the credibility of the defendant should he testify. The Court will allow the State to present evidence of prior conviction of attempted murder or any one or more other offenses for any of the above purposes.

It is a general rule that on a charge of a subsequent offense the question of a prior conviction is an essential

element of the offense charged and must not only be alleged in the indictment but also is an issue of fact to be presented to and determined by a jury.

Since it is within the jury's power to hear and receive evidence of the prior conviction and to weigh the same in a one-stage trial, the argument that the jury should be denied this information prior to reaching a verdict is not well taken and is hereby denied. (See State versus Gordon, 55 Ohio Opinions 2d 180.) The trial jury therefore will be submitted the issue of the prior conviction for attempted murder during the trial of the case — all to be presented in a one-stage proceeding. Motion to bifurcate or trifurcate this case in compliance with the suggestion set forth in the defendant's motion to dismiss Branch 2 will be denied. Motion to dismiss specifications overruled.

Branch 3. Motion to strike Specification 1 of the first count and Specification 1 of the second count of the indictment on the grounds that Section 2929.04AF of the Ohio Revised Code is vague, ambiguous and serves no justifiable State interest and therefore is violative of the defendant's constitutional right to due process of law is found not well taken and is hereby overruled.

Branch 4. Motion to strike Specification 1 of the first count and Specification 1 of the second count of the indictment for the reason that they are predicated on a guilty plea to attempted murder entered by the defendant Lonberger in Illinois in 1971 which plea the defense now claims was not intelligently and voluntarily entered by the defendant, submitted to the Court on the exhibits and the testimony of the defendant. Upon consideration of the same, the Court finds the motion not well taken and overrules the same. The Court finds on the evidence presented that the defendant is an

intelligent individual, well experienced in the criminal processes and well represented at all stages of the proceedings by competent and capable counsel in Illinois. On review of the certified copy of the Illinois proceedings and a transcript of the plea of guilty, the Court finds that every effort was taken to safeguard and to protect the constitutional rights of the defendant. Therefore, the Court finds that the defendant intelligently and voluntarily entered his plea of guilty in the Illinois court. The Court is of the opinion that the judgment of the Illinois court should be given full faith and credit and cannot be collaterally attacked in proceedings of this nature. However, in spite of the position of the Court in this matter, the evidence submitted at the time of the hearing convinced the Court by the quality of proof required that the plea of the defendant was voluntarily and intelligently entered and may therefore be submitted to the jury in this case in the form of specifications as provided by Ohio law.

Motion to supply defense Counsel with a copy of the transcript of the hearing of the defendant's motion to suppress found well taken in part and overruled in part. Both Counsel for the defendant and the State of Ohio were present and took copious notes throughout the entire proceeding. The only conceivable value of such a transcript at this stage of the proceedings would be for the purpose of using Detective Ulysses Howard's testimony for impeachment purposes at the trial of this case. Accordingly, a transcript of Detective Howard's testimony will be ordered to be supplied to the defense Counsel at the expense of the State. As to the other testimony and comments of Counsel and the Court, said motion is overruled.

On May 16, 1975, defendant filed a notice of alibi. The State of Ohio objects to the wording set forth therein which seeks to not limit the defendant to the specific locations alleged therein. In response to the oral motion of the State of Ohio to limit certain alibi testimony, the Court orders that the defense, in presentation of the alibi testimony, is limited to showing that at the time alleged

in the State of Ohio's Bill of Particulars, to-wit, between 7:00 and 10:00 p.m., January 29, 1975, the defendant was at the Medical College of Ohio, the Detroit Lounge, B & D Cafe, and his home at 915 Heston Street, Toledo, Ohio, or in transit between these several places.

Upon consideration of defendant's motion to limit or prohibit the introduction of certain photographs of the decedent's body into evidence at the trial of this case, the Court finds said motion not well taken and overrules the same. The Court further finds that the State of Ohio has in its possession a goodly number of photographs of the body of the decedent taken shortly after the discovery of her death. Many of these are colored slides showing the body in several different positions. The Court agrees that the presentation of all such photographs is not necessary, however, the probative value of the photographs identified at the hearing as State's Exhibits 3 through 12 inclusive, which photographs include two shots of the decedent's body, is not outweighed by the danger of prejudice to the defendant and may therefore, if properly identified and qualified for admission, be received in evidence at the trial of this case.

The Court takes note of the defendant's offer to stipulate that the decedent, Charita Lanier, was the victim of a homicide and that the cause of death was exsanguination caused by severing blood vessels in her neck as stated in the Coroner's Report, but the Court finds that these pictures depict the facts sought to be proved more fully, more accurately and more completely than could the oral testimony alone and therefore have much probative value and should be admitted. Motion to limit the introduction of evidence is accordingly overruled.

Hearing set May 20, 1975, at 1:30 p.m. for a determination by the Court on the issue of what testimony of prior criminal acts on the part of the defendant may be presented by the Prosecutor which tend to show motive or intent, the absence of mistake or accident on the part of the defendant, or the defendant's scheme, plan or system in doing the acts in question as provided in Section 2945.29 of the Ohio Revised Code.

/s/ signature deleted
JUDGE ROBERT V. FRANKLIN

*State v. Lonberger* No. CR75-5310
(Lucas County Court of Common Pleas)

(Thereupon, discussion was had off the record at the bench.)

MR. CZARNECKI: (Aside to reporter.) We would like to read into the record that: We offer to stipulate to Mr. Lonberger's record, and the Prosecutor, as of yesterday, the Prosecutor's office refused to accept the stipulation. (End of aside to reporter.)

THE COURT: Now, ladies and gentlemen, let me ask that all of you who are here as jurors would pay strict attention to the questions that are asked by the Court and by counsel so that if you are called to be examined you will be able to respond to questions that have already been asked.

New, ladies and gentlemen of the jury, the State of Ohio charges in this indictment, that the Defendant committed two violations of law, two violations of aggravated murder together with specifications to each charge which I will explain later.

From what has come to our attention thus far, I think generally the State of Ohio

*Lonberger v. Jago* (USDC/NW) No. C77-658

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Robert Lonberger,

Petitioner,

Civil No. C 77-658

vs.

Arnold R. Jago, Superintendent,

ORDER

Respondent.

Filed Oct. 19, 1979 10:36 a.m.

This cause came to be heard upon order of the Court of Appeals remanding this cause to this Court for expansion of the record and further consideration of the cause.

This Court, upon receipt of the transcript of petitioner's 1972 Illinois court proceedings as well as the indictment and resulting conviction statement thereto, together with the copy of the order of the Court of Common Please of Lucas County, Ohio entered pursuant to hearing held on May 16, 1975, has reviewed its opinion and order of December 7, 1978, as it pertains to the issue of the voluntariness of the petitioner's 1972 plea of guilty, and has concluded that such plea of petitioner was knowingly and voluntarily given, and that the proceedings of the Court of Common Pleas of Lucas County, Ohio, did not deprive petitioner of any constitutional rights. The Court hereby reaffirms its earlier decision and again dismisses the petition for a writ of habeas corpus.

THEREFORE, for the reasons stated herein, good cause appearing, it is

ORDERED that this Court's decision of December 7, 1978 is hereby reaffirmed and the petition for a writ of habeas corpus be, and it hereby is, DISMISSED.

IT IS SO ORDERED.

/s/ signature deleted
United States District Judge

Toledo, Ohio.

## CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing Joint Appendix have been served on respondent Robert Lonberger, by forwarding such copies through the office of his counsel, John Czarnecki, 900 Adams Street, Toledo, Ohio 43603 and Norman G. Zemmelman, 340 Spitzer Building, Toledo, Ohio 43604, by United States Mail, postpaid, this _____ day of _____, 1982. I further certify that all parties required to be served have been so served. Respondent's address is the Southern Ohio Correctional Facility at Lucasville, Ohio.

**RICHARD DAVID DRAKE**
*Counsel of Record*
*Assistant Attorney General*

# Opposition

ORIGINAL

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NO. 81-420

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

R. C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,

Petitioner,

v.

ROBERT LONBERGER,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

# RESPONDENT'S BRIEF IN OPPOSITION

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NO. 81-420

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

R. C. MARSHALL, Superintendent
Southern Ohio Correctional
Facility,

Petitioner,

v.

ROBERT LONBERGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

# RESPONDENT'S BRIEF IN OPPOSITION

## OPINION BELOW

The original opinion of the Court of Appeals (Pet. App. A9 - A20) is reported at 635 F. 2d 1189.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1980. A petition for rehearing was denied on December 30, 1980 (Pet. App. A21 - A22). A petition for a writ of certiorari was filed on February 25, 1981. This matter was remanded to the

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United States Court of Appeals for the Sixth Circuit for reconsideration in light of this Court's opinion in Sumner v. Mata, 449 U.S._____ 101 S. Ct. 764 (1981). (Pet. App. A8). An opinion reaffirming the original order was entered on June 11, 1981. (Pet. App. A1 - A7). This, the second petition for a writ of certiorari was filed on August 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit complied with the mandate of 28 U.S.C. §2254(d)(8) and correctly concluded that the state court record was inadequate to establish the voluntariness of a plea of guilty.

2. Whether submission of a constitutionally infirm prior conviction to the jury in a subsequent trial may be cured with a simple cautionary instruction.

## STATEMENT

On or about February 1, 1975 respondent was charged with the offense of aggravated murder in Lucas County, Ohio. Appended to the indictment was a "specification" alleging that he had "previously been convicted of an offense of which the gist was the purposeful * * * attempt to kill another * * *." A finding on the principal charge and the "specification" could result in the imposition of the death penalty. Respondent sought to dismiss the specification on the grounds that the earlier conviction (in

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Illinois) to which it referred was based upon an involuntary plea of guilty. A full hearing was held at which only the respondent testified, denying that he had been aware of the nature of the charge to which he had entered a plea. The state declined to offer any direct evidence. A conviction statement and the transcript of the Illinois plea and sentencing were introduced. The Ohio court denied the motion and, at trial, the conviction statement (with indictment appended) was given to the jury. A conviction was returned on both the substantive offense and the specification, and the death penalty was imposed. The Ohio Court of Appeals for the Sixth District determined that the State had failed to prove the offense of aggravated murder, reversed that conviction and entered a final judgment of guilty on the offense of murder. (Pet. App. A38 - A56). The Ohio Supreme Court refused to accept jurisdiction finding that the case "presented no substantial constitutional question."

The petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254 which was denied by the district court. (Pet. App. A23 - A37). The United States Court of Appeals for the Sixth Circuit reversed the district court finding that the State had failed to prove, by clear and convincing evidence, that petitioner had understood the earlier charges against him and that therefore his assertion that his plea was not knowledgeable should have been sustained. (Pet. App. A17 - A20). Introduction of an invalid conviction in a subsequent trial was held to require

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reversal under the rule announced by this Court in Burgett v. Texas, 389 U.S. 109 (1967). Following remand, an even more complete discussion of the state court hearing and findings was entered. (Pet. App. A1 - A7).

## ARGUMENT

1. This matter presents a relatively straight forward fact pattern wherein the Court of Appeals had before it a full and complete record of an evidentiary proceeding in a state court and found that record unworthy of the deference required by 28 U.S.C. §2254(d)(8).

1.a. The Petitioner herein seeks to argue that the Sixth Circuit failed to state with sufficient specificity the reasons for its refusal to accord deference to the state court finding herein. As such, the argument goes, this Court is asked to reverse on the strength of the holding in Sumner v. Mata, 449 U.S. _____, 101 S. Ct. 764 (1981). The Court need only refer to both the original opinion below (Pet. App. A17 - A20) and the opinion following remand (Pet. App. A1 - A7) for detailed and explicit findings by the Court of Appeals. Petitioner's argument is simply a misstatement of the record. As was pointed out in Sumner, a detailed examination of the evidence which was before the state court and a contrary finding by the federal court is precisely the situation contemplated by 28 U.S.C. §2254(d)(8). Sumner, 101 S. Ct. at 769 citing with approval Taylor v. Lombard, 606 F. 2d 371, 375 (2d Cir. 1979). The petitioner fails to rebut, or even

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address, the explicit finding of the Court of Appeals regarding the state court hearing on the voluntariness of the respondent's plea:

> . . . the state produced no evidence that the petitioner received or read the 1972 indictment charging him with attempted murder. The state introduced no evidence that the petitioner's counsel or the court explained that he was charged with attempted murder. Finally, the transcript is inadequate to show that petitioner understood that he was pleading guilty to attempted murder. We hold, therefore, that the state failed to meet its burden to show by clear and convincing evidence that the defendant understood the nature of the charge against him. (Emphasis added) (Pet. App. A12)

Here, as was the case in Taylor v. Lombard, the Court of Appeals made a detailed examination (and discussion) of the state court record and concluded that the findings previously made were unsupported by the record and were therefore not entitled to deference.

1.b. In an argument only slightly collateral to the above, petitioner attempts to reargue the merits of respondent's claim proposing the adoption of a "totality of the circumstances" approach to the analysis of the voluntariness of pleas. Essentially, the argument seems to be that any defendant who is literate, is represented by counsel and has some experience with the courts is presumed to understand the nature of the charges against him. That is not, and should not be, the law.

The cases are clear that, once the issue has been joined, the state must show not only a simple admission of conduct, but

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must also be able to establish that the defendant had been fully apprised of his rights and understood not only the factual basis for the charges, but also its legal ramifications. See, e.g., Boykin v. Alabama, 395 U.S. 238 (1969); Johnson v. Zerbst, 304 U.S. 458 (1938). In Henderson v. Morgan, 426 U.S. 637 (1976), this Court held that it must be shown that the defendant was apprised of the elements of the offense to which he was tendering a plea yet this petitioner would dismiss as "a hypertechnical and prophylactic rule" the Circuit Courts' holding that a plea must be invalid if the state could not even establish that the defendant was aware of the identity of the charge to which a plea of guilty was entered.

Further, the petitioner would suggest to this Court that the holding below was limited to an examination of the record by the proceedings in Chicago in 1971. A full and complete hearing was held in the Ohio proceeding in which the state was certainly free to introduce whatever collateral evidence it could obtain to establish that the defendant had been aware of the nature of the charge against him. 1/ Not a shred of evidence was introduced

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1/ Although certainly not an exhaustive list, the state might have secured transcripts of preliminary hearings or arraignments, testimony of the sentencing judge, the prosecutor, either of the two attorneys who had represented the defendant or, possibly, executed, written, plea forms. Further, the state had at least two opportunities to produce evidence on the issue: first in the district court on the original filing and later, when the Sixth Circuit remanded for a supplementation of the record on this specific issue.

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to rebut this respondent's steadfast assertion that he had never been apprised of the charge to which he was entering a plea.

The Court below quite properly held that, on the strength of a full and complete hearing, the state failed to establish the voluntariness of this respondent's earlier plea.

I.c. The petitioner contends as a third part of its first issue, that the Court of Appeals should have remanded the matter to the district court for an evidentiary hearing, citing Roddy v. Black, 516 F. 2d 1380 (6th Cir. 1975).

Roddy was a case involving the initial attack upon the voluntariness of a plea entered in a state court. Brought under 28 U.S.C. 2254, the district court quite properly conducted an evidentiary hearing to allow the state an opportunity to clarify and explain an inadequate record.

In the instant case, however, the district court (and subsequently, the Court of Appeals) were simply reviewing the record of what should have been a full and complete hearing conducted in the Ohio trial court. The respondent expressly raised the legitimacy of the earlier plea and conviction with a motion to dismiss the specification in the state trial court. The trial court held an evidentiary hearing at which the state was given an opportunity to present whatever evidence it had on the issue. It is simply untrue to assert, as the petitioner has, that "[T]he extent to which petitioner had actual notice and understanding * * * is not of record due to the refusal of the circuit court to remand for an evidentiary hearing." [Emphasis in original]. (Pet. 13, n.6).

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The respondent testified that he had never been apprised of the fact that he was entering a plea of guilty to the charge of attempted murder. The state had a full opportunity to show the extent of respondent's "notice and understanding" and presented not a scintilla of evidence. Respondent should not be required to relitigate issues simply because the state is later found to have failed to bear its burden of proof upon having been given an opportunity to do so.

2. The second issue raised by petitioner would appear to have already been addressed by this Court in Burgett v. Texas, 389 U.S. 109 (1967), a case presenting facts virtually indistinguishable from those at bar.

Petitioner has made its argument far more complex than either the facts or the applicable law warrant. To suggest that this case "presents an important issue of constitutional law regarding the scope and vitality of this Court's decision in Spencer v. Texas, 385 U.S. 554 (1967)" is to ignore a critical distinction between the two cases, a distinction raised, and decided, in Burgett.

In Spencer, the Court decided that the state had a legitimate interest in allowing the introduction of prior valid convictions to enhance the penalty for a subsequent offense, assuming, of course, a proper cautionary instruction to the jury.

Within nine months after deciding Spencer, the Court was confronted with Burgett, another Texas case, in which the jury had been advised of prior convictions which were constitutionally infirm.

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Even though the defendant in Burgett had not suffered an enhanced penalty and the jury had been admonished not to consider the prior crimes as evidence of guilty in the case at bar, the conviction was reversed. Introduction of a prior invalid conviction was held to be a fatal error in the conduct of the subsequent trial, regardless of a cautionary instruction. Although, as this Court noted, it does not "sit as a court of criminal appeals to review state cases," it will review state rules of evidence which act to abridge individual constitutional guarantees. Coerced confessions, illegally seized evidence, denial of the right of confrontation and, as in Burgett itself, denial of the right to counsel would all impel the Court to interject itself in state criminal proceedings.

Petitioner herein seeks to denigrate the ruling below by characterizing it as a "highly prophylactic on the record rule with respect to the validity of a guilty plea." He would have the Court limit the effect of Burgett to prior convictions secured in violation of some "specific" 2/ constitutional guarantee.

This case is not one that presents a simple formal failure of the requirements of Rule 11, F.R.Cr.P. Respondent denies that he was ever advised of the charge to which he was entering a plea.

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2/ Petitioner fails to enumerate those guarantees which fit his definition of "specificity."

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The transcript of the 1972 proceedings in Chicago support his assertion and the Ohio prosecutor produced no extrinsic evidence from which a contrary finding could be made. It is difficult to conceive a more specific and fundamental right than to be apprised of the charge to which a plea is being entered. It has been held that unless the defendant received full notice of the charge against him, he has been deprived of the "first and most universally recognized requirement of due process." Smith v. O'Grady, 312 U.S. 329 (1940).

The Court of Appeals quite properly refused to allow a conviction so secured to work a further deprivation of the respondent's rights by allowing the state to introduce it in a subsequent criminal prosecution, with or without a cautionary instruction.

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## CONCLUSION

This case is clearly distinguishable from Sumner v. Mata, 449 U.S. _____, 101 S. Ct. 764 (1981), in that the Court of Appeals herein made an exhaustive analysis of the record in the state court before concluding, quite properly, that the evidence had been insufficient to support the determination made and that, therefore, the finding of the state court was not entitled to the deference required by 28 U.S.C. §2254(d)(8).

This case, further, falls squarely within the explicit mandate of the Court in Burgett v. Texas, 389 U.S. 109 (1967). The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1981

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**ORIGINAL**

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-420

R. C. MARSHALL, Superintendent
Southern Ohio Correctional
Facility,

Petitioner,

v.

ROBERT LONBERGER,

Respondent.

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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The Respondent, Robert Lonberger, who is now held in the Columbus Correctional Facility at Columbus, Ohio, asks leave to file a Respondent's Brief in Opposition to the issuance of a Writ of Certiorari to the United States Court of Appeals for the Sixth District without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Respondent has been previously determined to be indigent and has proceeded in both the District Court and the Court of Appeals in forma pauperis pursuant to the provisions of the Criminal Justice Act of 1964.

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# Petitioner's Brief

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 81–420

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

R. C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
*Petitioner,*

v.

ROBERT LONBERGER.
*Respondent.*

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# ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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# BRIEF OF PETITIONER

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## QUESTIONS PRESENTED

I. WHETHER THE CONGRESSIONAL MANDATE OF 28 U.S.C. SECTION 2254(d) PRECLUDES THE GRANTING OF HABEAS CORPUS RELIEF ON THE GROUND THAT A PREVIOUSLY ENTERED GUILTY PLEA WHICH WAS UTILIZED ONLY AS AN AGGRAVATING DEATH PENALTY "SPECIFICATION" IS INVOLUNTARY: WHERE THE STATE JUDICIARY HAS MADE EXPRESS FACTUAL FINDINGS SUBSEQUENT TO A FULL EVIDENTIARY HEARING THAT, IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE ENTRY OF THE GUILTY PLEA, THE ACCUSED WAS AFFORDED NOTICE OF THE CHARGES AGAINST HIM AND VOLUNTARILY AND INTELLIGENTLY ENTERED THE PLEA OF GUILTY.

II. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE VACATION OF A STATE COURT MURDER CONVICTION WHERE: A GUILTY PLEA, SUBSEQUENTLY FOUND TO BE INVALID FOR PROCEDURAL FAILURE OF THE RECORD, IS ADMITTED INTO EVIDENCE FOR THE SOLE PURPOSE OF PROVING A DEATH PENALTY ENHANCING SPECIFICATION; THE STATE COURT JURY WAS EXPRESSLY INSTRUCTED THAT THE PRIOR GUILTY PLEA WAS NOT TO BE CONSIDERED FOR THE PURPOSE OF PROVING THE SUBSTANTIVE OFFENSE; THE SUBSTANTIVE OFFENSE WAS VACATED AND MODIFIED UPON APPELLATE REVIEW IN THE STATE COURTS FOR UNRELATED REASONS TO A LESSER CONVICTION NOT INVOLVING THE POTENTIAL OF THE DEATH PENALTY; AND WHERE EVIDENCE OF THE FEDERAL HABEAS CORPUS APPLICANT'S GUILT TO THE MODIFIED SUBSTANTIVE OFFENSE IS OVERWHELMING.

## PARTIES

The petitioner in this action is R. C. Marshall in his capacity as Superintendent of the Southern Ohio Correctional Facility at Lucasville, Ohio. The respondent is Robert Lonberger.

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## DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit upon remand from this Court is reported as **Lonberger v. Jago**, 651 F. 2d 447 (6th Cir. 1981) (A-1).[1] The order of this Court vacating and remanding the earlier circuit court judgment is reported as **Marshall v. Lonberger**, _____ U.S. _____, 101 S. Ct. 1967 (1981). (A-8). The initial decision of the United States Court of Appeals for the Sixth Circuit is reported as **Lonberger v. Jago**, 635 F.2d 1189 (6th Cir. 1980). (A-9). The decision of the United States District Court for the Northern District of Ohio, Western Division, is unreported. (A-23). The decision of the Ohio Court of Appeals for the Sixth Judicial District is unreported. (A-38).

## JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was enterd on June 11, 1981. Jurisdiction is conferred 28 U.S.C. Section 1254(1).

The petition for writ of certiorari was filed on August 28, 1981. Certiorari was granted by order of January 11, 1982.

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1. References to the Appendix to the petition for writ of certiorari are designated as "A." References to the Joint Appendix to this brief are designated as "JA."

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State derpive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

And 28 U.S.C. Section 2254 (d):

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and hair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

CASE NO. 81–420

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

R. C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
*Petitioner,*

v.

ROBERT LONBERGER.
*Respondent.*

## STATEMENT OF THE CASE

Respondent Robert Lonberger was indicted by the January, 1975 Term of the Lucas County, Ohio, Grand Jury on two (2) counts for the crime aggravated murder. Count two (2) of the indictment[2] charged respondent with a violation of Ohio Revised Code Section 2903.01 (B) which provides in pertinent part:

> No person shall purposely cause the death of another while committing or attempting to commit. . .rape

---

2. No verdict was returned with respect to count one (1). Thus, only count two (2) is in issue.

Under the then prevailing Ohio procedure,[3] imposition of the death penalty for aggravated murder was precluded unless a death penalty "specification" of an aggravating circumstance was separately alleged and proved beyond a reasonable doubt by the prosecution. *See* Ohio Revised Code Section 2929.03. The enumerated death penalty specifications were listed in Ohio Revised Code Section 2929.04. In addition to the principal change of aggravated murder, the Grand Jury indicted respondent pursuant to the specification in Ohio Revised Code Section 2929.04 (A)(5) which provided in pertinent part:

> The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another. . .

In order to establish the underlying charge of aggravated murder, the State presented evidence which established that the victim Charita Lanier was murdered in her home at approximately 10:00 p.m. on the evening of January 29, 1975. The murder was particularly brutal and death resulted from exsanguination as a result of a slashed throat. A blood-stained and bent twelve-inch knife was found at the scene and identified as the murder weapon. Blood stains indicated that Ms. Lanier was knifed in her living room and that her body was dragged to the kitchen, where it was found, only partially clothed, in a freezer. The victim's young sons, Hillary

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3. In **Lockett v. Ohio**, 438 U.S. 586 (1978) and **Bell v. Ohio**, 438 U.S. 637 (1978), this Court held Ohio's former death penalty mechanism unconstitutional on the ground that it unduly restricted the range of "mitigating circumstances" which a convicted murderer might interpose in order to escape execution. However, neither those rulings nor their underlying analysis are pertinent to the herein action.

and Kazedore Lanier, identified respondent and testified that respondent was at their mother's home on the evening of the murder. The children were upstairs in their bedroom while respondent and their mother were together downstairs. Hillary testified that he heard his mother scream. Kazedore testified that he thereafter went downstairs to the kitchen and found that all the lights were off. Respondent then refused to allow him to turn the lights on and ordered him to go back to bed.

In addition to this direct and forensic evidence, the State further established that a cigarette pack of respondent's brand was found in the house. Finally, the State introduced respondent's blood-stained clothing into evidence.

The only evidence indicating that the victim had been raped consisted of autopsy results which revealed the presence of sperm in her vaginal canal.[4]

It was on the basis of the foregoing evidence that the jury returned a verdict of guilty to the substantive crime of aggravated murder.

In order to prove the separate and distinct question of respondent's guilt as to the death penalty specification, the prosecution presented evidence pursuant to Ohio Revised Code Section 2945.75(B) which provides:

> Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence suffi-

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4. As will be hereinafter discussed, this wholly circumstantial evidence of rape proved fatal to the prosecution's rape-murder conviction as a matter of state law.

> cient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

In accord with said state statute, the prosecution offered a journal entry of conviction which established that respondent had entered a plea of guilty to the crime of attempted murder before the Circuit Court of Cook County, Illinois, in 1972.

Respondent filed a pre-trial motion to dismiss the death penalty specification alleging that the 1972 Illinois guilty plea was invalid for the reason that it was not knowingly and voluntarily entered. Pursuant to said motion, the Common Pleas Court conducted a full evidentiary hearing.

During the evidentiary hearing, the State presented the certified transcript of proceedings of respondent's 1972 Illinois guilty plea. The record reflected that respondent had been indicted by the May 1971 Term of the Cook County Illinois, Grand Jury on one (1) count for the crime of aggravated battery [causing great bodily harm] in violation of Chapter 38, Section 12-4 of the Amended Illinois Revised Statutes, on two (2) counts for the crime of aggravated battery [using a deadly weapon] in violation of Chapter 38, Section 12-4(b-1) of the Amended Illinois Revised Statutes, and on one (1) count for the crime of attempt [to kill by cutting] in violation of Chapter 38, Section 8-4 of the Illinois Revised Statutes. The record established that on June 7, 1971, respondent appeared before the Illinois Court for the purpose of arraignment and entered pleas of not guilty while represented by counsel. The record further established that respondent remained incarcerated and subsequently obtained alternate counsel.

On March 10, 1972, respondent and his attorney appeared before the Illinois Circuit Court for the purpose of trial. At the outset of the proceedings, respondent's attorney informed the Court that a proposed plea bargain agreement had been reached and requested a conference in order to obtain the Court's approval. Thereupon, the following colloquy was had between the Court and respondent:

> THE COURT: Do you know what a conference is? That means the State's Attorney, your counsel and myself will sit down and discuss certain things about your case. Thereafter, if everything is acceptable to all, a possible plea and disposition by way of guilty.
>
> Understand that, sir:
>
> THE DEFENDANT: Understand.
>
> THE COURT: Knowing all this, and I am going to find out certain things about the case, as well as certain things about you I would not ordinarily find out at this time, knowing all this information, do you wish for us to have a conference?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Understand after the conference, despite the fact I have this information, you will not be entitled to a substitution of Judges?
>
> Understand that, since you agreed to the conference:
>
> THE DEFENDANT: Yes.

At the conclusion of the in chambers conference, respondent and his attorney conferred and the following exchange occurred:

> MR. XINOS: [Defense Counsel] Mr. Lonberger is before the Court and desires to change his previously entered plea of not guilty to that of guilty.
>
> Ready to proceed.
>
> THE COURT: Is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: In other words, you are pleading guilty, that you did on August 25, 1968, commit the offense of aggravated battery on one Dorothy Maxwell, and that you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct:
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you did on the same date commit the offense of aggravated battery on one Wendtian Maxwell, is that correct?
>
> That is what you are pleading to, sir?
>
> THE DEFENDANT: Yes, sir.

After advising respondent of those rights which he was waiving by pleading guilty, the Illinois Court further advised respondent of the respective penalties for aggravated battery and attempt as follows:

> THE COURT: Understand by pleading guilty I could sentence you from one to ten on the

> aggravated battery, and attempt one to twenty. So, I could sentence you to the penitentiary for a maximum of from one to forty years.
>
> Understand that?
>
> THE DEFENDANT: Yes, sir.

Respondent then assured the Court that no threats or promises had been made except that he would be sentenced to a term of from two (2) to four (4) years imprisonment. Respondent, through counsel, then stipulated that the indictment "is both sufficient in law and in fact to sustain the charges contained therein, to sustain a finding of guilty on the charges. . ."

Respondent chose to testify in his own behalf during the Ohio pre-trial evidentiary hearing. Respondent testified that he had been incarcerated for a period of thirteen (13) months prior to the entry of his Illinois guilty plea and, that during this extended period, he had neither been served with a copy of the indictment nor had either of his two (2) attorneys informed him that one of the counts charged him with attempt [to kill by cutting]. Respondent further testified that, despite the Illinois Court's express statement regarding the crime of attempt and subsequent explanation of its attendant penalty, he subjectively believed that he was only "copping out to aggravated battery." Respondent conceded that he was a seasoned veteran of both the criminal court system and the Illinois penal institutions, but professed ignorance of the 1972 proceeding on the basis that Chicago tribunals were "Kangaroo Courts."

The Ohio trial court personally questioned respondent and it was developed that he was both educated, articulate, and remarkably conversant with criminal procedure. At the conclusion of the evidentiary hearing,

the Ohio trial court found that respondent's 1972 Illinois guilty plea had been entered voluntarily and with an understanding of the charges against him.

During the course of respondent's trial, a certified copy of the Illinois entry of judgment for the crime of attempt [to kill by cutting] was admitted into evidence. The jury found respondent guilty of the specification and respondent was sentenced to death by electrocution.

Respondent appealed his conviction and sentence to the Ohio Court of Appeals for the Sixth Judicial District. On April 22, 1977, the state appellate court issued a comprehensive opinion. (A-38). Relying upon this Court's decision in **Spencer v. Texas**, 385 U.S. 554 (1967), the Court of Appeals held that admission of evidence regarding respondent's prior attempted murder did not constitute a violation of the Due Process Clause of the Fourteenth Amendment. Specifically, the Court found that the following admonition given to the jury by the trial court was in accord with **Spencer** dictates and preempted any concerns that the jury would consider the prior Illinois conviction as evidence of guilt with respect to the crime of aggravated murder:

> Now, the evidence presented to your concerning a prior conviction of this Defendant, Robert Lonberger, for the offense of attempted murder in Illinois in 1968 is not introduced for the purpose of proving that the Defendant committed the offenses, or either of them, for which he is being tried this week. This evidence was presented to prove the first specification of the first count of the indictment and the first specification of the second

> count of the indictment as required by law.
>
> It is the responsibility of the jury to make a finding of guilty or not guilty of each of these specifications attached to any count of the indictment upon which you find the Defendant guilty, if you do, in fact, find him guilty of either of the principal charges. These specifications must be proved to you beyond a reasonable doubt.
>
> The only way a jury can determine whether or not the Defendant was previously convicted of the offense of attempted murder as charged by the State in the two specifications previously referred to is to hear and consider evidence tending to prove such a conviction. Thus, this evidence of a prior conviction was presented only for the purpose of proving the prior conviction. This is the only purpose for which you may consider it.
>
> You may not consider it for the purpose of proving, in any way, that the Defendant committed the offenses for which he is being tried today. [Trail Transcript pages 1178-1180].

However, the Court of Appeals went on to hold that the State's proof of guilt with respect to rape was entirely circumstantial and thus, as a matter of Ohio law, was subject to the requirement that it be wholly inconsistent with any reasonable conclusion other than the defendant's guilt. *See* **State v. Kulig**, 37 Ohio St. 2d 157 (1974). The Court held that while the prosecution had established

that the victim had engaged in sexual intercourse, that fact was not wholly inconsistent with a theory of voluntary sexual relations and thus precluded a finding of forcible rape. Accordingly, the Court ordered "that the judgment on the verdict of guilty of aggravated murder in violation of R.C. 2903.01(B) be and hereby is reversed, and that a final judgment of guilty of murder in violation of R.C. 2903.02 be and hereby is entered."

Cross motions for leave to appeal were thereafter dismissed by the Supreme Court of Ohio for want of a substantial constitutional question. In accord with the state appellate court mandate, respondent thus stood convicted of the lesser offense of "having purposely caused the death of another" and was resentenced to a term of from fifteen (15) years to life imprisonment.

Respondent subsequently filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Northern District of Ohio, Western Division. The district court examined the state court record of proceedings and determined that "[f]rom a review of the record, this Court is satisfied that an ordinary person would have understood the nature of the charges to which petitioner was pleading guilty." (A-31). The district court held that the guilty plea satisfied the requirements of Illinois procedure as set forth in Illinois Ann. Stat. ch. 110A Section 402 and construed in **People v. Cook**, 26 Ill. App. 3d 44, 324 N.E. 2d 432 (1975). The district court held that the record demonstrated that respondent's guilty plea was voluntarily and intelligently entered in accord with constitutional dictates in that respondent understood both the nature of the offenses to which he pleaded guilty and their attendent penalties. **Boykin v. Alabama**, 395 U.S. 238 (1969). Relying upon this Court's decision in

**Spencer v. Texas**, *supra.*, the district court held that use of the Illinois conviction during respondent's Ohio trial did not offend the provisions of the Due Process Clause. (A-28). Respondent filed a notice of appeal and was granted a certificate of probable cause.

The United States Court of Appeals for the Sixth Circuit reversed the lower court judgment and remanded to the district court for issuance of the writ of habeas corpus. **Lonberger v. Jago**, 635 F. 2d 1189 (6th Cir. 1980) (A-9). The Court of Appeals found the transcript of respondent's 1972 Illinois guilty plea "on its face . . . inadequate to show that the defendant understood the charge to which he was pleading." (A-19). Specifically, the appellate court held that the Illinois trial court's use of the term "attempt" without adding the phrase "to kill by stabbing" deprived respondent of "real notice of the true charges against him." **Henderson v. Morgan**, 426 U.S. 637 (1976). While noting that the fact of respondent's previously vacated death sentence and that a **Spencer v. Texas**, *supra* limiting instruction had been given to the jury, the circuit court reasoned that **Burgett v. Texas**, 389 U.S. 109 (1967) required that respondent's murder conviction be vacated.

Petitioner thereafter filed a petition for rehearing. Petitioner noted that the Court of Appeals had, in the first instance, found respondent's 1972 Illinois guilty plea to be *facially* invalid. However, the circuit court did not, and upon the basis of the record before it, could not make a finding with respect to respondent's *actual knowledge* of the nature of the charges to which he entered his guilty plea. Petitioner further noted that as the district court had found the guilty plea valid on its face, an evidentiary hearing had not been held, but, that given the circuit court's disagreement as to the facial validity of the plea, the proper remedy was a remand to the district court with instructions to conduct an evidentiary

hearing wherein both the Illinois trial judge and respondent's Illinois attorney could testify as to explanations made to respondent regarding the attempt to kill by stabbing conviction.[5] Petitioner further argued that the Illinois conviction had only been admitted for the limited purpose of proving the death penalty specification which had earlier been vacated on unrelated grounds by the Ohio Court of Appeals. As the jury is expected to follow the limiting instructions tendered by the trial court, it was error for the circuit court to simply presume that the jury did not follow the trial court's admonition. **Spencer v. Texas,** *supra* as page 562. Petitioner finally noted that respondent stood convicted of having "purposely caused the death of another" and that the evidence presented overwhelmingly established respondent's guilt.

The Court of Appeals thereafter issued an order denying the petition for rehearing. (A-21).

Petitioner filed a petition for writ of certiorari with this Court. This Court issued an order granting the petition which vacated the judgment and remanded to the circuit court for reconsideration in light of **Sumner v. Mata,** 449 U.S. 539 (1981). **Marshall v. Lonberger,** ____ U.S. ____, 101 S. Ct. 1967 (1981). (A-8).

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5. In **Roddy v. Black,** 516 F.2d 1380 (6th Cir. 1975), the district court had determined that the habeas corpus applicant's guilty plea was facially invalid. The district court conducted an evidentiary hearing in order to ascertain the petitioner's actual understanding of the charges to which he pleaded guilty. On the basis of this extrinsic evidence, the district court found as a matter of fact that the petitioner actually understood the nature of the offenses to which he pleaded guilty and dismissed the petition. The circuit court affirmed the district judgment. The herein petitioner's petition for rehearing simply requested that the Court of Appeals adher to such procedure and remand for an evidentiary hearing.

Upon remand, the United States Court of Appeals for the Sixth Circuit did not allow for additional briefing or further argument. Rather, on June 11, 1981, the circuit court *sua sponte* issued an opinion reinstating its former judgment. **Lonberger v. Jago**, 651 F. 2d 447 (6th Cir. 1981). (A-1).

Petitioner's motion to stay the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure was granted.

## SUMMARY OF ARGUMENT

### I.

In **Henderson v. Morgan**, 426 U.S. 637 (1976), this Court held that a guilty plea must be vacated as involuntary where the accused was neither arraigned upon the charge to which he pleaded guilty nor otherwise notified of the true nature of the charge against him. However, the Court noted the unusual facts presented and emphasized that the voluntariness of guilty plea does not depend upon a prophylactic recital of the formal legal elements of the offense but, rather, stated that a reviewing court should determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused. *Id.* at page 644.

In the instant case, the circuit court found respondent's guilty plea to be invalid solely upon the premise that the Illinois trial court, in its colloquy with respondent, stated that "you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct?," (JA - 8) rather than "you did on the same date attempt [to kill] Dorothy Maxwell, with a knife, is that correct."

The rule fashioned by the circuit court is in marked contrast to the criteria enunciated by this Court in **Henderson v. Morgan,** *supra.*, as the circuit court refused to examine the totality of the circumstances surrounding the entry of the guilty plea.

During the Ohio pre-trial evidentiary hearing wherein respondent sought to collaterally attack the Illinois guilty plea, it was developed that respondent was an intelligent and literate individual who had earlier had considerable experience with both the criminal justice system and Illinois state penal system. Respondent had been represented by two (2) attorneys, had been afforded a preliminary hearing, and had twice been arraigned upon the charge.

Respondent chose to testify during the Ohio evidentiary hearing and claimed that during the entire tenure of his thirteen (13) month pre-trial confinement he had never been informed that he was charged with attempted murder through service of the indictment, during his preliminary hearing and arraignments, or by either of his two (2) attorneys. Respondent acknowledged that the Illinois trial court had stated the separate crimes and their attendant penalities but attempted to explain away this discrepancy by insisting that he believed that he was "copping out" to only one (1) count of aggravated battery and that his counsel had told him to simply go along with whatever the Illinois trial judge stated.

Subsequent to the evidentiary hearing, the Ohio trial court made an express factual finding that respondent's Illinois guilty plea had been intelligently and voluntarily entered. (JA - 100). Said factual finding clearly demonstrates that the Ohio trial court found

respondent's testimony to be self-serving and "wholly incredible." **Blackledge v. Allison**, 431 U.S. 63, 73-74 (1977).

The circuit court refused to accord the Ohio factual findings the deference mandated by 28 U.S.C. Section 2254(d) as construed by this Court in **Sumner v. Mata**, 449 U.S. 539 (1981). Rather, the circuit court simply reiterated that its newly fashioned rule required that the guilty plea be held invalid without reference to the totality of the circumstances surrounding the entry of such plea.

II.

In **Spencer v. Texas**, 385 U.S. 554 (1967), this Court held that the Due Process Clause of the Fourteenth Amendment was not offended when a jury considering a substantive criminal charge is advised of the accused's prior criminal convictions for the sole purpose of sentencing enhancement and the jury is given a limiting instruction which forbids consideration of the prior convictions when deliberating upon the guilt or innocence of the defendant. While evidencing no small displeasure with this Court's decision in **Spencer** (A-16), the circuit court went on to hold that **Burgett v. Texas**, 389 U.S. 109 (1967) compelled the vacation of respondent's Ohio murder conviction despite the express limiting instruction given by the trial court and the jurors assurances to both the trial court and counsel that the Illinois conviction would not effect their deliberation upon the substantive offense charged.

The circuit court's reliance upon **Burgett** is unfounded. In **Burgett**, the Court reasoned that the use of uncounselled convictions in enhanced penalty settings

would serve to undermine the express Sixth Amendment right to counsel enunciated in **Gideon v. Wainwright**, 372 U.S. 35 (1963) and thereby result in "a 'specific federal right' being denied anew." *Id.* at page 116.

The Illinois guilty plea was, unlike the uncounselled convictions utilized in **Burgett**, not "presumptively void" nor does its supposed infirmity result from the violation of "a specific federal right." The circuit court has promulgated a rule whereby limiting instructions cannot ever serve to vitiate any prejudice which might otherwise result upon admission of prior convictions where such earlier convictions are, for any reason, subsequently determined to be invalid. The circuit court judgment must be vacated if this Court's decision in **Spencer** and its analytic underpinnings are to avoid serious erosion.

## ARGUMENT

### I.

**WHETHER THE CONGRESSIONAL MANDATE OF 28 U.S.C. SECTION 2254 (d) PRECLUDES THE GRANTING OF HABEAS CORPUS RELIEF ON THE GROUND THAT A PREVIOUSLY ENTERED GUILTY PLEA WHICH WAS UTILIZED ONLY AS AN AGGRAVATING DEATH PENALTY "SPECIFICATION" IS INVOLUNTARY: WHERE THE STATE JUDICIARY HAS MADE EXPRESS FACTUAL FINDINGS SUBSEQUENT TO A FULL EVIDENT-**

**IARY HEARING THAT, IN LIGHT OF THE TOTALITY OF THE CIRCUM-STANCES SURROUNDING THE ENTRY OF THE GUILTY PLEA, THE ACCUSED WAS AFFORDED NOTICE OF THE CHARGES AGAINST HIM AND VOLUNTARILY AND INTELLI-GENTLY ENTERED THE PLEA OF GUILTY.**

In **Henderson v. Morgan**, 426 U.S. 637 (1976), this Court considered the constitutional requisites of a valid guilty plea and stated:

> A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, *see, e.g.*, **Johnson v. Zerbst**, 304 U.S. 458, 464-465, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 ALR 35, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense. **Smith v. O'Grady**, 312 U.S. 328, 85 L. Ed. 85, 61 S. Ct. 572. *Id.* at 645 n. 13.

The habeas corpus applicant in **Henderson v. Morgan**, *supra.*, was a young mentally retarded man indicted for first degree murder. Morgan subsequently entered a plea of guilty to second degree murder. Morgan

thereafter filed a petition for writ of habeas corpus alleging that his plea was not intelligently tendered in that he was unaware that intent to cause death was an element of second degree murder. The federal district court conducted an evidentiary hearing and made a finding of fact that neither the trial court nor Morgan's defense counsel had advised Morgan of the mens rea element. As Morgan had not been given real notice of the true nature of the charge against him, the district court held the plea to be involuntary.

In affirming said judgment, this Court stated that the factual finding of the district court precluded a determination that the plea was voluntary. This Court further noted that the fact that Morgan had never been formally charged with the offense to which he pleaded guilty, coupled with his intellectual deficiency, supported the conclusion that he was uninformed of the "intent" element of the crime. In concurrence, Justice White pointed out the unusual aspect of the case by stating:

> This case is unusual in that the offense to which the defendant pleaded was not charged in the indictment. The indictment charged first-degree murder. The defendant pleaded guilty to the included offense of second-degree murder, the elements of which were not set forth in any document which had been read to the defendant or to which he had access. See **McCarthy v. United States**, 394 U.S. 459, 467 n. 20, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969). In those cases in which the indictment is read to the defendant by the court at arraignment or at the time of his plea, his plea of guilty may well be deemed a factual admission

> that he did what he is charged with doing so that a judgment of conviction may validly be entered against him. *Id.* at page 650 n. 2.

Having neither been arraigned upon the charge to which he pleaded guilty nor otherwise notified of the "true nature of the charge against him" the Court held that due process mandated vacation of the plea as involuntary. **Smith v. O'Grady**, 312 U.S. 329 (1941).

In response to the State's argument that the Court's ruling would "invite countless collateral attacks on judgments entered on pleas of guilty," the Court dismissed such fears as exaggerated by stating:

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. This case is unique because the trial judge found as a fact that the element of intent was not explained to respondent. Moreover, respondent's unusually low mental capacity provides a reasonable explanation for counsel's oversight; it also forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it lends at least a modicum of credibility to defense counsel's

> appraisal of the homicide as a manslaughter rather than a murder. *Id.* at page 647.

The Court was careful to emphasize the voluntariness of a guilty plea did not hinge on a ritualistic litany of the formal legal elements of the offense but, rather, a reviewing court should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused. *Id.* at page 644.

In holding respondent's plea to be involuntary, the circuit court herein wholly failed to adhere to this Court's admonition that the totality of the circumstances surrounding the entry of the plea must be evaluated in order to ascertain whether an accused was afforded real notice of the true nature of the charge against him. The circuit court further failed to accord the deference mandated by 28 U.S.C. Section 2254(d) to the express factual findings made by the Ohio judiciary. **Sumner v. Mata**, 449 U.S. 539 (1981).

Respondent was indicted in Illinois on counts of aggravated battery and one (1) count for the crime of attempt. Chapter 38, Section 8-4 of the Illinois Revised Statutes defines attempt as follows:

> A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

The attempt count of the indictment returned against respondent reads in pertinent part:

> The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on August 25th, 1968, at and within said County Robert Lonberger committed the offense of attempt, in that he, with intent to commit the offense of murder, intentionally and knowingly attempted to kill Dorothy Maxwell by cutting Dorothy Maxwell with a knife without lawful justification, in violation of Chapter 38, Section 8-4, of the Illinois Revised Statutes 1967. (JA - 3)

The Circuit court found respondent's guilty plea to be invalid predicated solely upon the very narrow ground that the Illinois trial court, in its colloquy with respondent, stated that "you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct?," rather than "you did on the same date attempt [*to kill*] Dorothy Maxwell, with a knife, is that correct." It was upon this solitary basis that the court below reasoned that respondent's plea had not been intelligently entered with a fundamental notice of the nature of the charge against him. The wholly prophylatic rule enunciated by the circuit court both constitutes an egregious misinterpretation of the Court's ruling in **Henderson v. Morgan**, *supra* and represents a myopic refusal to examine the totality of the circumstances surrounding the entry of the plea which were developed by the state courts.

Prior to trial, respondent filed a motion to dismiss the death penalty "specification" that he had previously been convicted of attempted murder. Respondent sought to collaterally attack the Illinois guilty plea by contend-

ing that he thought he was "copping out to aggravated battery" and had no idea that he had ever been charged with, or pleaded guilty to, attempt to kill. The trial court held a lengthy pre-trial evidentiary hearing. Therein, the following facts were developed: (1) that respondent was arrested on February 7, 1971 and charged with the aggravated battery and attempt to kill offenses arising out of a knife attack upon one Dorothy Maxwell and her child; (2) that respondent remained continuously incarcerated in the Cook County Jail from the date of his arrest until the entry of his guilty pleas on March 19, 1972 – a period of approximately thirteen (13) months; (3) that respondent was a seasoned veteran of the Illinois state penal system; (4) that respondent had appeared before criminal courts on numerous occasions on a variety of charges including murder and rape and was well acquainted with the Illinois criminal justice system; (5) that respondent initially retained Attorney George C. Howard to represent him; (6) that shortly after his arrest respondent was arraigned upon the charges against him; (7) that respondent thereafter was afforded a preliminary hearing wherein the victim Dorothy Maxwell appeared and offered testimony; (8) that the judge found probable cause to believe that respondent had committed the offenses charged and bound respondent over to the Grand Jury; (9) that the Grand Jury returned the indictment previously alluded to; (10) that respondent again appeared for arraignment upon the charges and entered pleas of not guilty; (11) that respondent became disenchanted with Attorney Howard and obtained the services of Constantine P. Xinos who enjoyed a professional reputation as a "good public defender"; (12) and that respondent was intelligent and literate.

During the hearing, respondent conceded that he had heard the Illinois trial judge mention the separate charges and their attendent penalties but insisted that he

subjectively believed that he was "copping out" to only one (1) count, that he was never served with the indictment, that during the entire thirteen (13) month period of his incarceration neither of his attorneys bothered to so much as inform him of what he was charged with, and that neither the judge presiding at his preliminary hearing nor those judges presiding at his two (2) arraignments informed him of said charges. Respondent admitted that he had personally assured the Illinois court that no promises had been made with the sole exception of the sentence to be imposed but asserted that his attorney had essentially told him to lie and go along with whatever the judge said. Respondent offered no evidence or additional testimony which tended to corrobarate any aspect of his testimony. Finally, respondent acknowledged that he was fully cognizant of the fact that he was facing death in the electric chair unless the Illinois guilty plea was ruled invalid.

At the conclusion of the pre-trial hearing, the Ohio trial court made the following pertinent findings of fact:

> . . .that the defendant is an intelligent individual, well experienced in the criminal processes and well represented at all stages of the proceedings by competent and capable counsel in Illinois. On review of the certified copy of the Illinois proceedings and a transcript of the plea of guilty, the Court finds that every effort was taken to safeguard and to protect the constitutional rights of the defendant. Therefore, the Court finds that the defendant intelligently and voluntarily entered his plea of guilty in the Illinois court. (JA - 100)

It is thus obvious that the Ohio trial court did not credit respondent's testimony. The Ohio court was clearly empowered to reject respondent's tesimony as self-serving and incredible. In **Blackledge v. Allison,** 431 U.S. 63 (1977), this Court examined a similar issue and stated in pertinent part:

> The representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formiable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible. **Machibroda,** *supra,* at 495-496, 7 L. Ed. 2d 473, 82 S. Ct. 510 (section 2255); **Price v. Johnston,** *supra,* at 286-287, 92 L. Ed. 1356, 68 S. Ct. 1049 (section 2243). *Id.* at pages 73-74.

The foregoing demonstrates that the facts of the instant cases are not even remotely akin to those presented in **Henderson v. Morgan,** *supra.* Respondent was an intelligent adult male well versed in the criminal justice system. Respondent pleaded guilty to the *original charges* upon which he had previously attended a preliminary hearing and upon which he had twice been arraigned and entered pleas of not guilty. During the guilty plea proceeding, respondent expressly stipulated that he was guilty of all charges in both law and fact. The hypertechnical and prophylactic "on the record rule" espoused by the circuit court constitutes a marked deviation from the totality of the circumstances test fashioned in **Henderson v. Morgan,** *supra.* It is imperative

that the circuit court opinion be reversed in order that the meaning of this Court's decision in **Henderson v. Morgan,** *surpa* can be definitively stated and thereby provide guidance to the lower federal courts.

The initial circuit court opinion was summarily vacated by this Court and remanded for reconsideration in light of **Sumner v. Mata,** *supra.* In **Sumner,** this Court held that Congress had enacted 28 U.S.C. Section 2254 (d) in order to reduce federal-state friction by requiring deference to state court factual determinations unless the habeas corpus applicant had established that he fell within one of the eight (8) enumerated exceptions to the statute.

Upon remand, the circuit court *sua sponte* issued an opinion reinstating its prior judgment.[6] The court conceded that its conclusions were in direct conflict with those of every other court which previously considered the question but stated that the factual determinations were not fairly supported by the record within the meaning of 28 U.S.C. Section 2254(d)(8). In sole support of said conclusion, the circuit court simply reiterated that the Illinois trial court's failure to add the words "to kill" in its explanation of the attempt count deprived respondent of notice of the charge against him.[7]

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6. The court did not allow for rebriefing or reargument.

7. The court further stated that "[t]he prosecutors sought to imply by the questioning of Lonberger that he must have heard of the "attempt" charge either at his arraignment or in conversation with his attorney. Lonberger testified that he had not, and the state provided no contrary evidence." (A-6). However, the Ohio trial court did not credit respondent's testimony and the state, through cross-examination, presented overwhelming circumstanial evidence which demonstrated that respondent did, in fact, have knowledge of the charges against him. Petitioner would again emphasize that he vigorously entreated the circuit court to remand the case to the district court for the purpose of conducting an evidentiary hearing which would once and for all alleviate any perceived or subjective reservations entertained by the circuit court. The Court of Appeals steadfastly refused to do so.

Petitioner submits that the circuit court has quite simply allowed the exception to swallow the rule. Moreover, the reasoning is tautological. Had the district court perceived the supposed failing in the adequacy of the Illinois guilty plea transcript, an evidentiary hearing would have been conducted wherein the testimony of respondent's trial attorney would have been dispositive. *Compare,* **Roddy v. Black,** *supra.* However, as the circuit court, in the first instance, discovered the inadequacy of the record and refused to remand for an evidentiary hearing in order to ascertain respondent's *actual knowledge* of the crimes charged, the now wholly unrelated Ohio murder conviction is vacated.

The Ohio trial court examined the totality of the circumstances surrounding the entry of respondent's Illinois guilty and made an express factual finding that the plea was intelligently and voluntarily entered. Respondent's intelligence, his maturity, his prior exposure to the criminal justice system, his lengthy pretrial confinement, his three (3) arraignments on the attempted murder charge, and his representation by competent counsel clearly support the factual finding of the Ohio judiciary. As the circuit court simply failed to adhere to the Congressional mandate set forth in 28 U.S.C. Section 2254(d), the judgment below must be reversed.

## II.

**WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE VACATION OF A STATE COURT MURDER CONVICTION WHERE: A GUILTY**

**PLEA, SUBSEQUENTLY FOUND TO BE INVALID FOR PROCEDURAL FAILURE OF THE RECORD, IS ADMITTED INTO EVIDENCE FOR THE SOLE PURPOSE OF PROVING A DEATH PENALTY ENHANCING SPECIFICATION; THE STATE COURT JURY WAS EXPRESSLY INSTRUCTED THAT THE PRIOR GUILTY PLEA WAS NOT TO BE CONSIDERED FOR THE PURPOSE OF PROVING THE SUB-STANTIVE OFFENSE; THE SUBSTAN-TIVE OFFENSE WAS VACATED AND MODIFIED UPON APPELLATE REVIEW IN THE STATE COURTS FOR UNRELATED REASONS TO A LESSER CONVICTION NOT INVOLVING THE POTENTIAL OF THE DEATH PENALTY; AND WHERE EVIDENCE OF THE FEDERAL HABEAS CORPUS APPLICANT'S GUILT TO HE MODIFIED SUBSTANTIVE OFFENSE IS OVERWHELMING.**

In **Spencer v. Texas**, 385 U.S. 554 (1967) this Court held that an accused is not denied his rights as secured by the Due Process Clause of the Fourteenth Amendment when a jury considering a substantive criminal charge is advised of the accused's prior criminal convictions for the sole purpose of sentencing enhancement and the jury is given a limiting instruction which preempts consideration of the prior convictions when deliberating upon the guilt or innocence of the defendant. In rejecting the

contention that the use of prior convictions in a current criminal trial of an accused was so egregiously unfair upon the issue of guilt or innocence as to offend the Due Process Clause, the Court stated:

> To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence. For example, all joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge.
>
> * * *
>
> This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest. *Id.* at page 562.

The Court discounted the petitioner's reliance upon decisions such as **Jackson v. Denno**, 378 U.S. 368 (1964),

by distinguishing those claims which arise as a result of a specific constitutional right and those which find support only in the more amorphously grounded due process or general "fairness" approach. Specifically, the Court stated:

> In the procedures before us, in contrast, no specific federal right-such as that dealing with confessions-is involved; reliance is placed solely on a general "fairness" approach. In this area the Court has always moved with caution before striking down state procedures. It would be extravagant in the extreme to take Jackson as evincing a general distrust on the part of the Court or the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can never purge the erroneous introductions of evidence or limit evidence to its rightful purpose. *Id.* at page 565.

It was upon the basis of the aforementioned distinction that this Court decided **Burgett v. Texas,** 389 U.S. 109 (1967). Therein, this jury was made aware of the petitioner's prior uncounseled convictions. The Court held that the limiting instruction tendered by the Texas trial court was insufficient to dissipate the inherent prejudice occasioned by the admission of a conviction constitutionally infirm under the express Sixth Amendment guarantee to counsel. The Court expressly distinguished **Spencer** as follows:

> Our decision last Term in Spencer v. Texas, 385 U.S.554, 17 L ed 2d 606, 87 S. Ct 648, is not relevant to our present problem. In Spencer the prior convictions were not presumptively void. Moreover, the contention was that the guilt phase of the trial was prejudiced by the introduction of the evidence of prior crimes. As the Court noted, "[i] n the procedures before us . . . no specific federal right-such as that dealing with confessions-is involved; reliance is placed solely on a general 'fairness' approach." Id, at 565, 17 L ed 2d at 615. In this case, however, petitioner's right to counsel, a "specific federal right," is being denied anew. This Court cannot permit such a result unless Gideon v. Wainwright is to suffer serious erosion. *Id.* at pages 115-116.

The instant case closely parallels the enhancement procedure employed by the Texas recidivist statute. Respondent was charged with the substantive offense of felony-murder, i.e., murder during the course of a rape. The State presented overwhelming evidence that respondent was the instrumentality of the victim's death and the savage method used to take her life belays any doubt that the killing was purposeful. As a separate and distinct matter, respondent was additionally charged with a death penalty specification which alleged that he had previously been convicted of attempted murder. The trial court was careful to expressly admonish the jurors that evidence of the earlier Illinois conviction was unrelated to the substantive offense charged and could not be used in any manner during the deliberation upon respondent's guilt or innocence of the murder charged.

Even given that the circuit court's deviation from this Court's prior opinions regarding the requisites of a constitutionally valid guilty plea can withstand scrutiny, the judgment must fail.

Unlike **Burgett**, respondent did not "suffer anew" from the introduction of a "presumptively void" prior conviction obtained in violation of a specific federal right. Rather, respondent has suceeded, years later, in convincing a federal circuit court sitting in a collateral habeas corpus proceeding to adopt a highly prophylacitc "on the record" rule with respect to the validity of a guilty plea. This newly fashioned rule goes so far as to prevent a State from defending the integrity of the challenged plea by presentation of evidence which demonstrates that it was entered voluntarily and with a complete understanding of the nature of the offense and its concommittant consequences. The result of the circuit court judgment is to vacate a conviction for murder which is wholly unrelated to the guilty plea determined to be invalid.

The Court of Appeals holding presents a direct and substantial issue of the continuing vitality of this Court's decision in **Spencer v. Texas**, *supra*. In **Spencer**, the Court acknowledged the inherent opportunities for prejudice when the jury is made aware of the prior convictions of an accused. The Court noted that such opportunities for unfairness inhere to "all joint trials, whether of several codefendants or of one defendant charged with multiple offense." *Id.* at page 562. However, the Court stated that "[i] t would be extravagant in the extreme" to question "the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge" or to state "that limiting instructions can never purge the erroneous introduction of evidence or limit its

rightful purpose." *Id.* at page 565. The Court properly reasoned that to hold limiting instructions inadequate to vitiate prejudicial effects "would make inroads into this entire complex code of state criminal evidentiary law." *Id.* at page 562.

The demands of the Due Process Clause were considered in a somewhat varied context by this Court in **Murphy v. Florida**, 421 U.S. 794 (1975). Therein, the record reflected that the state court jurors had been exposed to extensive newspaper coverage of the accused who was referred to by the media as "Murph the Surf." The jurors had read various accounts regarding the defendant's "flamboyant lifestyle," and were aware of his prior convictions for a notorious jewel theft and for murder. In affirming Murphy's conviction, this Court held that the constitutional standard of fairness does not require that jurors be totally ignorant of the facts and issue involved but, rather, "it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at page 800. To like effect, during the voir dire examination in respondent's state court trial, the jurors assured both the trial court and counsel that they would follow the trial court's instructions and would not consider respondent's prior Illinois conviction as evidence of guilt upon the substantive crime of murder. The holding in **Murphy**, has since been reaffirmed by this Court. *See* **Dobbert v. Florida**, 432 U.S. 282, 303 (1977).

The salient effect of the federal court opinion and order denying rehearing is a declaration that limiting instructions given to a jury are *per se* inadequate to vitiate the possible prejudicial effects which inhere upon reception by the jury of information regarding an accused's prior conviction. Such ruling clearly calls into issue the vitality of this Court's decision in **Spencer v.**

**Texas,** *supra* and, more importantly, its analytical underpinning. A decision by this Court is imperative in order to advise the States of the precise scope of the demands which the Due Process Clause places upon the administration of their criminal justice systems.

The circuit court has invalidated respondent's Ohio murder conviction through an extremely dubious determination that his 1972 Illinois guilty plea was not knowingly and voluntarily entered and despite the fact that such prior conviction is totally unrelated to the crime for which respondent is presently incarcerated. The Ohio jury which convicted respondent of murder assured the trial court that they would consider respondent's guilt or innocence without reference to his prior conviction and the evidence presented establishes beyond peradventure that respondent is, in fact, guilty of the substantive offense of murder. Indeed, any arguable "error" is clearly subsumed within the ambit of the harmless error doctrine.

The ultimate effect of the circuit court holding is the creation of a per se rule which requires the vacation of the underlying substantive offense whenever a prior conviction admitted solely for enhancement purposes is subsequently found to be invalid. The ruling in **Burgett** does not support such an overly broad proposition and, more importantly, the circuit court judgment rejects the very rational upon which **Spencer** was decided, i.e., that jurys can and will follow a limiting instruction tendered by a trial court. As the circuit court ruling is in direct conflict with this Court decision in **Spencer v. Texas,** *supra.*, the lower court judgment must be reversed.

## CONCLUSION

The judgment of the Court of Appeals is in conflict with precedents of this Court and, as such, must be reversed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief of Petitioner have been served on respondent Robert Lonberger, by forwarding such copies through the office of his counsel, John Czarnecki, 900 Adams Street, Toledo, Ohio 43624 and Norman G. Zemmelman, 340 Spitzer Building, Toledo, Ohio 43604, by United States Mail, postpaid, this day of , 1981. I further certify that all parties required to be served have been so served. Respondent's address is the Southern Ohio Correctional Facility at Lucasville, Ohio.

RICHARD DAVID DRAKE
*Counsel of Record*

# Respondent's Brief

Supreme Court, U.S.
FILED
MAR 24 1982
ALEXANDER L. STEVAS
CLERK

No. 81-420

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

R. C. MARSHALL, SUPERINTENDENT
SOUTHERN OHIO CORRECTIONAL FACILITY,
*Petitioner,*

vs.

ROBERT LONBERGER,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR THE RESPONDENT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Sixth Circuit correctly applied the mandate of 28 U.S.C. 2254(d) by affording a presumption of correctness to prior factual findings of an Ohio state court and then applying the standards of the federal constitution to those facts.

2. Whether a conviction, not based upon an intelligent and voluntary waiver of known constitutional rights, can be introduced in a subsequent trial for any purpose.

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### AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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**No. 81-420**

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R. C. MARSHALL, SUPERINTENDENT
SOUTHERN OHIO CORRECTIONAL FACILITY,

*Petitioner,*

VS.

ROBERT LONBERGER,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

## BRIEF FOR THE RESPONDENT

---

## STATEMENT OF THE CASE

Respondent accepts the recitations in the Brief for Petitioner covering the opinion below, the jurisdictional basis for this Court's hearing the case, the constitutional and statutory provisions involved (with the addition of the Sixth Amendment to the Constitution of the United States), and the chronology of the statement of proceedings in state and federal court.

## STATEMENT OF FACTS

The respondent was charged, by indictment, with the crime of aggravated murder in the Court of Common Pleas for Lucas County, Ohio. As the petitioner pointed out in its brief, under the then-existing law, a "specification" was appended to the indictment making the imposition of the death penalty a possibility. To that end, the State would be required to show *both* that the respondent was guilty of aggravated murder *and* that he had "previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another. . . ." The specification in this case charged that the respondent had entered a plea of guilty to the charge of attempted murder before the Circuit Court of Cook County, Illinois, on March 10, 1972.

Prior to trial, the respondent filed a motion to dismiss the specification contending that it was based upon an invalid plea. The trial court set the matter down for hearing and it was agreed that, the respondent having raised the matter, the burden shifted to the state to establish the validity of the plea. To bear its burden, the prosecution introduced a conviction statement from the Circuit Court of Cook County reflecting, in pertinent part, that the respondent had been convicted, on the day in question, of the offense of "aggravated battery, etc. . . ." Also introduced by the state was the transcript of the proceedings at which the respondent's plea was entered. Nowhere in either of those documents was the offense of "attempted murder" ever mentioned.

Respondent took the stand and steadfastly maintained that he had tendered a plea of guilty only to the charge of aggravated battery. Notwithstanding extensive cross-examination by both the prosecutor and the trial judge, the respondent was adamant in his assertion that a plea bargain

had been struck, he had entered a plea of guilty to aggravated battery and was to receive a sentence of from 2-4 years. Although a continuance of the pretrial hearing was granted to allow the introduction of additional evidence, the state chose to put on no evidence in rebuttal.

The trial judge issued an opinion which held that:

> [O]n the evidence presented the defendant is an intelligent individual, well experienced in the criminal processes and well represented at all stages of the proceedings by competent and capable counsel in Illinois. On review of the certified copy of the Illinois proceedings and a transcript of the plea of guilty, the Court finds that every effort was taken to safeguard and to protect the constitutional rights of the defendant. Therefore, the Court finds that the defendant intelligently and voluntarily entered his plea of guilty in the Illinois court.

The trial court did *not* make a finding that the respondent had actual knowledge that the charge to which he was entering a plea was that of attempted murder.

The matter then went to trial, and notwithstanding the petitioner's representations to the contrary, the evidence was far less than overwhelming. The victim's two children, 6 and 8 years of age, testified that the respondent had been at their home on the night in question and had been there when they went to bed. They had only met him once before and, in fact, knew only his given name. They identified a somewhat nondescript knit hat found at his home as belonging to respondent and as having been worn by him on the night of the crime. The "bloodstained" clothing referred to by the state consisted of a pair of pants with some small spots identified as blood. The respondent introduced evidence that the blood was his and a laboratory analysis was inconclusive as to whether the blood was of a "mixture" of types common

to the victim *and* the respondent or that of the respondent alone. It is safe to say that the evidence of guilt was exclusively circumstantial.

In fact, recognizing the devastating effect that evidence of a prior conviction for attempted murder would have, the respondent sought an order bifurcating the trial, thereby keeping the fact of the prior conviction from the jury until after the guilt/innocence phase of the trial. When that motion was rejected by the trial court, the respondent proffered a stipulation that he had a prior conviction for attempted murder in a further attempt to keep that information from the jury while they were deciding the substantive offense. The prosecution rejected the proffer and the trial court refused to accept it over the state's objection.

In order to prove the prior conviction (a factual determination under Ohio law) the jury was given a copy of the conviction statement. Here, since that statement only recited "aggravated battery, *etc.*" (emphasis added), the jury, over respondent's objection, was given a copy of the underlying Illinois indictment which recited that respondent was charged with attempting to murder one Dorothy Maxwell, with a knife.

As the petitioner pointed out the defendant was convicted and, following a separate hearing, a sentence of death was imposed. On appeal, the Ohio Court of Appeals determined that the state had proved only the offense of (simple) murder. The sentence of death was therefore vacated and a sentence of 15 years to life was imposed.

## SUMMARY OF ARGUMENT

### PROCEDURAL CLAIM - APPLICABILITY OF THE DOCTRINE ANNOUNCED IN *SUMNER V. MATA*, 449 U.S. 539 (1981)

Petitioner's argument ignores the distinction between this case and the issue joined in *Sumner*. In its initial opinion, and even more clearly in its opinion after remand, the Court of Appeals below accepted the historical facts as found by the state court but held that, applying federal constitutional principles, those facts failed to satisfy the state's burden of showing that the respondent's Illinois plea and conviction had been based upon an intelligent and voluntary waiver of known rights.

This case is distinguishable from *Sumner* on at least two levels. Either the state trial court herein applied an erroneous legal standard by holding that a plea can be intelligent and voluntary in the absence of notice of the nature of the charge or, in the alternative, it found that respondent had notice of the charge, notwithstanding the absence of any affirmative evidence sufficient to support such a finding. If it was the former, *Sumner* (and §2254[d]) simply are not applicable, and if it was the latter, the "finding" was not entitled to the deference otherwise properly accorded state court findings.

The petitioner raised for the first time in a motion for reconsideration in the Court of Appeals the argument that rather than a remand for new trial, the Court should have remanded for an evidentiary hearing in the district court. A full and complete hearing was conducted in the state court at which the specific issue was joined and the state was given every opportunity to present whatever evidence it had (or could have obtained). In its response to the petition filed in

the district court, the state explicitly argued that "no evidentiary hearing is required". Following the decision of the district court it was discovered that the Illinois transcript had not been before the court. The matter was therefore initially remanded by the Court of Appeals for the purpose of supplementing the record on the issue of the validity of the Illinois plea and conviction. The petitioner made no attempt to provide additional evidence. Settled principles of law preclude the argument that the state should be allowed to reopen the record at this stage of the proceedings.

**THE CLAIM ON THE MERITS - THE STATE FAILED TO VALIDATE THE ILLINOIS CONVICTION AND THE INTRODUCTION OF AN INVALID CONVICTION CONSTITUTES REVERSIBLE ERROR UNDER THE DOCTRINE ANNOUNCED IN *BURGETT V. TEXAS*, 389 U.S. 109 (1967).**

Reduced to its basic format, the state appears to argue that the respondent's simple suggestion that a defendant must be advised of the nature of the crime to which he is pleading is a "hypertechnical and prophylactic 'on the record rule.'" Initially, it should be pointed out that at no time has this respondent taken the position that the state was limited to the transcript of proceedings in the Illinois court. The state has had at least two distinct opportunities, at the hearing on the pretrial motion to dismiss and again on the federal habeas petition, to produce whatever additional evidence it might have to show that this respondent had notice of the offence to which he was entering a plea. No such evidence was ever produced.

It is neither a unique nor a particularly startling concept that a plea must be based upon actual knowledge of the

nature of the charge. The Sixth Amendment to the Constitution of the United States explicitly requires that "[the accused shall] be informed of the nature and cause of the accusation. . . ." It is beyond argument that real notice of the true nature of the charge against the accused is the first and most universally recognized requirement of due process.

Without notice of the charge against him in Illinois, this respondent's conviction there was based upon a deprivation of a specific constitutional right. To allow that conviction to be introduced in the Ohio prosecution caused the respondent to suffer that deprivation anew.

## ARGUMENT I

### PETITIONER'S RELIANCE UPON THE DECISION IN *SUMNER V. MATA* FOR REVERSAL IS MISPLACED ON AT LEAST TWO GROUNDS.

The decision of the Court of Appeals is within the mandate of §2254(d) in that it has accepted the basic, historical facts found by the state court and applied accepted federal constitutional principles thereto. Further the ultimate issue, found by the state court, is one of mixed fact and law which was unsupported by the record of the hearing conducted therein.

#### (A) There has been no Significant Departure from the Primary, Historic Facts found in the State Court.

After hearing, the Ohio trial court made four specific factual findings:

1. "The defendant [was] an intelligent individual";

2. He was "well experienced in the criminal process";
3. He had been "well represented at all stages of the proceedings by competent and capable counsel in Illinois";
4. and upon review of the Illinois record, "every effort was taken to safeguard and to protect the constitutional rights of the defendant."[1]

The Court of Appeals acknowledged, without comment, findings one through three (above) and independently reviewed the transcript of the Illinois plea hearing.

It is respectfully submitted that, even if the respondent were to have stipulated to the validity of the state court findings of historical fact, those findings simply do not support the legal conclusion that the respondent had the constitutionally required actual notice of the charge to which he was claimed to have entered a plea. To hold, as the Ohio trial court did, that the respondent entered an intelligent and voluntary plea without a finding that he had notice of the actual nature of the charge is a *non sequitur.*

---

[1]While the Court of Appeals for the Sixth Circuit did not address the issue and the respondent does not raise it herein, there is arguable support for a finding, under 28 U.S.C. §2254(d)(8) that even some of these "primary" facts were not fairly supported in the record. For instance, the only "evidence" of respondent's intelligence was his demeanor, his assertion that he had reached the ninth grade and his ability to calculate his own age, with some difficulty, at a particular time in the past. Further, in a post-trial psychological examination he was found to possess a full range intelligence quotient of 81, barely in excess of what is sometimes considered to be the borderline for mental retardation. On the question of competence of trial counsel, the record reflects *only* respondent's representations that each of his lawyers visited him once in the Cook County Jail in the thirteen months that he was incarcerated and that he had secured his second lawyer because he "had heard that he was a good public defender."

**(B) The Court of Appeals Has Simply Determined the Legal and Constitutional Significance of the Facts as Found by the State Court.**

In *Sumner v. Mata*, 449 U.S. 539 (1981) this Court sought to set standards for the legislative mandate of 28 U.S. §2254(d) (1976). The Court therein attempted to outline procedures for implementing the section, citing with approval the findings of the Court of Appeals for the Second Circuit in *Taylor v. Lombard*, 606 F.2d 371 (1979) *cert. denied*, 445 U.S. 946 (1980).

In reviewing the legislative history of 28 U.S.C. §2254(d), it is found that the section was prompted to a large extent by the Judicial Conference of the United States. *See*, S.Rep. No. 1797, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3663. The section was not intended to establish a novel approach to federal habeas jurisdiction beyond a codification of the Court's opinion in *Townsend v. Sain*, 372 U.S. 293 (1963). For example, in *Brewer v. Williams*, 430 U.S. 387, 395 (1977) it was specifically held that the statute simply codifies most of the criteria set out in *Townsend*.

As in *Brewer*, the parties herein agreed that the record generated in the state court was an adequate basis for determination of the constitutional principles raised by the habeas petitioner. Unlike the record in *Brewer* or to an even greater extent in *Sumner*, all of the primary, historical facts in this case were neatly encapsulated in a pretrial hearing at which the issue was clearly delineated. There has been no suggestion that the federal court went beyond the state court record or gave additional deference to facts denigrated by the state court.

The reasoning in *Townsend* [and the language of §2554(d)(8)] requires that the federal courts give deference only to

those basic, primary, or historical facts: facts " 'in the sense of a recital of external events and the credibility of their narrators.' . . . So-called mixed questions of fact and law, which require the application of a legal standard to the historical fact determinations are not facts in this sense" *Townsend v. Sain,* 372 U.S., 293, 309, at n. 6, *quoting, Brown v. Allen,* 344 U.S. 443, 506 (1953) (concurring opinion of Frankfurter, J.). More recently, in *Cuyler v. Sullivan,* 446 U.S. 335, 341-2 (1980), the Court applied the standard to a case involving allegedly improper multiple representation. It was held that the roles played by counsel in the defense are "facts" [within the application of § 2554(d)] "but the holding that the lawyers who played those roles did not engage in multiple representation is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case [citations omitted]. That holding is open to review on collateral attack in a federal court."

In situations clearly analogous to the one at bar, the federal courts have long held that the voluntary character of confessions are mixed questions of fact and law in which "federal courts exercising habeas corpus jurisdiction, . . . cannot abdicate their responsibility to assess whether state court judges have correctly applied federal constitutional standards." *United States ex rel. Rush v. Ziegele,* 474 F.2d 1356, 1358-59 (3d Cir. 1972); *see also, Gunsby v. Wainwright,* 596 F.2d 654, 655 (5th Cir.), *cert. denied,* 444 U.S. 946 (1979); *Taylor v. Cardwell,* 579 F.2d 1380, 1383 (9th Cir. 1978); *Lee v. Hopper,* 499 F.2d 456, 462 (5th Cir.), *cert. denied,* 419 U.S. 1053 (1974).

The cases are legion which have applied federal constitutional standards to facts surrounding pleas of guilty and found those pleas to have been vulnerable to collateral attack. *See,*

*e.g., Santobello v. New York,* 404 U.S. 257 (1971); *Brady v. United States,* 397 U.S. 742 (1970).

Obviously recognizing that pleas of guilty are subject to review in federal habeas corpus, this Court has held, in *Blackledge v. Allison,* 431 U.S. 63, 75 (1977), that:

> In administering the writ of habeas corpus and its § 2255 counterpart, the federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.

It is significant that the petitioner had failed to point to a single fact to which the Court of Appeals failed to pay the deference required by § 2254(d). It is only the conclusion which is claimed to be at variance with that reached by the state court. If this Court were to accept the position of the petitioner, it would elevate the deference required by § 2254(d) to the status of an irrebuttable presumption. Neither the statute itself nor the constitution could countenance such a result.

The petitioner apparently urges this Court to adopt a doctrine which would require the federal courts, in the face of a silent record, to be absolutely bound by irrebuttable presumptions that, not only did the state court find all the material facts, but that it had applied the proper legal standard. Such an approach creates an insurmountable burden on the habeas petitioner and would also limit federal review of state court decisions to those that explicitly utilize an improper legal standard.

## ARGUMENT II

### THE COURT OF APPEALS CORRECTLY FOUND THAT THE 1972 ILLINOIS CONVICTION WAS INVALID AND ITS INTRODUCTION IN THE OHIO ACTION CONSTITUTED REVERSIBLE ERROR.

Not only did the state fail to bear its burden of validating the earlier conviction but, also, the introduction of that invalid conviction, even assuming a proper limiting instruction, constitutes reversible error.

#### (A) The State Failed to Bear its Burden to Show, in the Face of an Inadequate Record, that the 1972 Illinois Conviction was Based on a Valid Plea.

It is axiomatic that a plea of guilty is invalid unless there can be "an affirmative showing that it was intelligent and voluntary." *Boykin v. Alabama,* 395 U.S. 238, 242 (1969). The decisions of this Court are legion which have held that pleas, as waivers of constitutional rights, must "not only be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748 (1970) and cases cited therein at n. 6. In both *Boykin* and *McCarthy v. United States,* 394 U.S. 459 (1969), the Court emphasized the importance of establishing a record in the trial court which would support a finding that the "utmost solicitude of which courts are capable [is exercised] in canvassing the matter with the accused to make sure he has a

full understanding of what the plea connotes and of its consequences." 395 U.S. at 244.

Notice of the nature of the charge is such a basic element of our judicial system that it is embodied in the Sixth Amendment to the Constitution. It has been called that "first and most universally recognized requirement of due process* * *." *Smith v. O'Grady*, 312 U.S. 329 (1941); *see also, Henderson v. Morgan*, 526 U.S. 634 (1976). (The Court holding not only that the accused must be advised of the nature of the offense but also the essential elements thereof.)

A review of the Illinois record reveals not even a single reference to the charge of attempted murder. In the face of a silent record the burden must, at the very least, shift to the state to show that the plea was knowing and voluntary. In the analogous situation of pleas tendered pursuant to Rule 11, Federal Rules of Criminal Procedure, this Court has refused even to allow the government to cure such a defective record. While not precisely applicable to the case at bar the Court's reasoning is instructive:

> From the defendant's perspective, the efficacy of shifting the burden of proof to the Government at a later voluntariness hearing is questionable. In meeting its burden, the Government will undoubtedly rely upon the defendant's statement that he desired to plead guilty and frequently a statement that the plea was not induced by any threats or promises. This prima facie case for voluntariness is likely to be treated as irrebuttable in cases such as this one, where the defendant's reply is limited to his own plaintive allegations that he did not understand the nature of the charge and therefore failed to assert a valid defense or to limit his guilty plea only to a lesser included offense. No matter how true these allegations may be, rarely, if ever, can a defendant corroborate them in a post-plea voluntariness hearing.

*McCarthy v. United States,* 394 U.S. 459, 469 (1969).

Prior to the production of the record from Illinois, this respondent initiated his motion to dismiss, contending that he had never entered a plea of guilty to a charge of attempted murder. The transcript of the proceedings on the plea and sentence in Illinois bear out the reasonableness of his understanding since nowhere, except in one count of the indictment, is "attempted murder" ever mentioned.

The petitioner places great weight upon the appearance of the charge in the indictment, as it obviously must. The argument is made that it is *unlikely* that respondent spent some thirteen months in the Cook County Jail and attended both an arraignment and a preliminary hearing without having had the indictment read to him. The argument is defective on at least two grounds. First, contrary to the position of the petitioner, the standard of review is *not* a *probability* or what is, or is not, *likely.* Second, and perhaps most important, the contents of the indictment are, at best, only instructive on the identity of the charge to which the plea was ultimately entered. In fact, even the state must concede that at least one count of aggravated battery was dismissed (although the record is likewise silent on that disposition). The trial judge indicated that the possible sentence was "one to ten on the aggravated battery, and attempt one to twenty. So, I could sentence you to the penitentiary for a maximum of from one to forty years." Again, forced to extrapolate from a silent record, we might *assume* that the sentencing court believed itself to be proceeding on two aggravated battery counts and one of attempted murder. Thus the petitioner cannot support an argument premised on the assumption that the respondent simply entered pleas to the

four indictments as originally constituted.[2] Further, and even more basic, advancing the argument that the indictment for attempted murder provided the requisite notice assumes the very fact in issue, that is, that this respondent did in fact enter a plea to that indictment.

Similarly lacking is any recitation, at the sentencing hearing, of underlying facts which support the plea. Such absence lends credibility to respondent's assertion at the Ohio hearing that he thought the Illinois judge's inquiry about whether he "attempt[ed] on Dorothy Maxwell, with a knife" was designed to elicit such facts.[3]

Further, even the sentence imposed in Illinois makes no mention of multiple sentences to be served concurrently or consecutively. It appears that a single sentence was entered, presumably for a single offense.

In the face of a silent record, fraught with ambiguities, and this respondent's unequivocal assertion at the hearing that he was never advised and was totally unaware that he was entering a plea to the charge of attempted murder, no reasonable application of settled constitutional principles could validate the Illinois plea and subsequent conviction. The petitioner has never produced a scintilla of evidence that

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[2]Although likewise not explained, it would appear that the Illinois law in effect at the time of the plea would not have permitted a finding of guilty on charges of aggravated battery and attempted murder arising out of the same operative facts. *See, e.g., People v. Steen*, 9 Ill. App.3d 488, 292 N.E.2d 413 (1972); *People v. Horne*, 110 Ill. App.2d 167, 249 N.E.2d 282 (1969). Apparently the petitioner would urge the court that the respondent and his counsel were competent enough to read the charge into a silent record but not competent enough to be cognizant of the existing law.

[3]Illinois law defined aggravated battery as, *inter alia*, "committing a battery* * * [with] * * * a deadly weapon." Illinois Criminal Code of 1961, Chap. 38, §12-4(b) (1).

could enable a court to find that the respondent received notice of the charge to which he was entering a plea. The Court of Appeals was clearly correct in its holding on the merits.

**(B) Introduction of a Invalid Conviction for any Purpose in a Subsequent Trial Requires Reversal.**

In Part II of its Argument, petitioner relies on the holding of *Spencer v. Texas,* 385 U.S. 554 (1967), in contending that, even if the Illinois conviction was void and the foregoing evidence therefore inadmissible, respondent was not prejudiced by its admission, since the state trial court gave a limiting instruction. Petitioner's argument rests on a misperception of the holding in *Spencer* as well as of the holding in *Burgett vs. Texas,* 389 U.S. 109 (1967). Both *Spencer* and *Burgett* arose under the Texas recidivism statutes and involved the introduction of prior crimes for the purpose of enhancing punishment. In both cases, the court took into account the efficacy of a limiting instruction.

The facts in both *Spencer* and *Burgett* were relatively straight forward. In *Spencer* the defendant objected to the introduction of his prior, concededly valid conviction on the grounds that such evidence was so inherently prejudicial as to constitute a violation of due process. The Court in *Spencer* discussed at great length the body of law which has grown up over the years to permit the introduction of prior crimes under strictly controlled circumstances. Acknowledging that Texas had a valid interest in formualting rules of evidence and in enforcing its recidivism statutes, the Court applied a balancing test in which the admittedly prejudicial effect of the evidence was weighed against the

valid state interest in its introduction. The damaging effect of the introduction of the prior conviction was held to have been outweighed by the valid state interest and the limiting instruction that was given at the time of its admission. While expressing reservations about the wisdom and even the fairness of the Texas procedure, the Court held that any deprivation which occurred had not risen to the level of a due process violation.

It can not be emphasized too strongly that the holding in *Spencer* was premised on the validity of the prior conviction. In fact, within ten (10) months the Court decided *Burgett* which presented a strikingly similar factual background *except* that, under the same statute, with a proper limiting instruction, the state had presented the jury with a conviction later shown to have been invalid. The Court reversed the conviction, holding that *Spencer* was irrelevant in situations involving an attempt to introduce an invalid conviction. No balancing test need be applied for the state simply has no valid interest in the introduction of convictions resulting from violations of specific constitutional rights. The defendant was found to have suffered once before as a result of a constitutional violation and no application of state law can permit a renewal of that deprivation.

Although the reasoning of *Burgett* would appear to settle the issue, even *Spencer* does not support the introduction herein. Part of the analysis in *Spencer* was premised on the assumption that evidence of prior convictions was usually non-inflammatory introduced in a coldly analytical documentary fashion. In the case at bar, however, the trial judge felt that the "conviction statement" (the ordinary method of proving prior convictions) was ambiguous since it only reflected "aggravated battery, *etc.*" He therefore decided, over respondent's objection, to give the jury a copy of the underlying indictment.

Thus, in this case involving the murder of a female with a knife, the jury was advised that the defendant had previously entered a plea to an attempted murder, of a woman, with a knife.

Following the order in the trial court which held that the conviction in Illinois was valid and admissible, recognizing the overwhelming effect that introduction would have, the respondent moved for an order bifurcating the guilt phase of the trial to allow the jury to consider the underlying offense without having the fact-finding process infected with the introduction of the prior conviction. The motion for bifurcation was denied. Again, in a further attempt to keep the inherently prejudicial conviction from the jury, the respondent proffered a stipulation on the Illinois conviction, thus removing any necessity for the conviction's introduction to the finder of fact. The prosecution refused to so stipulate and the trial judge refused to enforce it.

Petitioner argues that the limiting instruction cured any possible prejudice. No jury instruction could possibly eliminate the resultant prejudice to the respondent. As stated by the Court:

> What Mr. Justice Jackson said in *Krulewitch v. United States,* concurring opinion, in the sensitive area of conspiracy is equally applicable in this sensitive area of repetitive crime. 'The naive assumption that prejudicial effects can be overcome by instructions to the jury... all practicing lawyers know to be unmitigated fiction.'

*Burgett v. Texas,* 389 U.S. at 115 (citations omitted); *see also, Bruton v. United States,* 391 U.S. 123 (1968).

The damaging quality of the admission of prior convictions was explicitly recognized in the opinion in *Burgett* in which it was held that:

> The admission of a prior criminal conviction which is constitutionally infirm under *Gideon v. Wainwright* is inherently prejudicial and we are unable to say that the instruction to disregard it made the constitutional error "harmless beyond a reasonable doubt"* * *

*Burgett v. Texas*, 389 U.S. 109, 115 (1967).

In both *Burgett* and the case at bar the state introduced evidence of a prior conviction for the purpose of enhancing the penalty in a subsequent criminal proceeding. In both, the earlier convictions were invalid as a result of the denial of a specific constitutional right. In both, the jury was given a limiting instruction on the use to be made of the prior conviction. In neither, was the enhanced penalty actually imposed. The facts in *Burgett* were held to require reversal of the subsequent conviction and that decision controls herein.

## ARGUMENT III

## THE COURT OF APPEALS WAS ENTIRELY CORRECT IN ITS REFUSAL TO REMAND TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING.

The standard for ordering an evidentiary hearing on a federal petition for habeas corpus filed pursuant to 28 U.S.C. §2254 is well settled, at least in those cases in which it is the petitioner who requests a hearing. In *Townsend v. Sain*, 372 U.S. 293 (1963), the Court held that a hearing should be denied in those instances where the failure to produce the proffered evidence in state court was attributa-

ble to the "inexcusable neglect" of the petitioner. *Id.* at 317 *citing, Fay v. Noia,* 372 U.S. 391, 438 (1963). Certainly the same standard must be applied to the state as is to be enforced against a petitioner, perhaps indigent or even unrepresented by counsel familiar with federal constitutional standards. The state herein has been afforded at least two full opportunities to present its evidence. Not only was a full hearing held in the state court but a continuance was granted at its conclusion to allow additional evidence. Later in the federal district court, the petitioner explicitly rejected two distinct opportunities to introduce evidence. Allowing it to return to the district court for yet another hearing would only "sanction needless piecemeal presentation of constitutional claims in the form of deliberate bypassing of state procedures," *id.*

Further, in its Return of Writ in the district court, the state took the *explicit* position that no hearing was required. At the Court of Appeals, it was not suggested that a hearing was required until a motion for reconsideration was filed. Even then, no formal proffer was made. The rule has been established beyond argument that once a party has advocated a position in litigation and has successfully persuaded the court to act thereon, the party will not be heard later to contradict his previous position. *See, e.g., Overhead Door Corp. v. Newcourt, Inc.,* 611 F.2d 989, 990 (5th Cir. 1980). Whether the doctrine is known as "invited error", "judicial estoppel", or "estoppel to allege error", the principle is clear that denies a litigant the right to pursue arguments which shift with the sands of necessity.

Likewise, this petitioner, who urged upon the district court the argument that no evidentiary hearing was required, cannot now argue that the court erred in accepting that proposition.

## IV

## CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit is supported by both the record and the applicable law. It should be affirmed in all respects.

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# Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
JUN 11 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 81–420

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

R.C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
*Petitioner,*

v.

ROBERT LONBERGER,
*Respondent.*

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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# REPLY BRIEF OF PETITIONER

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## STATEMENT OF THE CASE

For present purposes the only additional statement of the case necessary is a clarification of the acutal evidence adduced at respondent's trial and a realistic perspective of respondent's supposed intellectual deficiency as portrayed in respondent's brief.

The jurors in respondent's state court trial were presented the following uncontroverted evidence: (1) that on the night of the murder respondent was, with the sole exception of the victim and her children, the only person in the residence; (2) that the children heard their mother scream at which point one of the children went downstairs; (3) that upon arriving in the kitchen, the victim's son was refused permission to turn on the light and ordered to return upstairs by the respondent; (4) that the victim was thereafter found in a state of undress in a freezer in the kitchen; (5) that the vitim's throat had been slashed by a blood-stained and bent twelve-inch knife found at the scene; and (6) that respondent's clothing was blood-stained. Given the state of the evidence, respondent's characterization of the evidence as "far less than overwhelming" is, at best, simply inaccurate.

The second error in respondent's brief is technically accurate but exceedingly misleading.

Pursuant to the then applicable Ohio law, respondent underwent extensive psychiatric testing subsequent to his conviction. The results of such testing were presented by three (3) psychiatrists and one (1) psychologist during the ensuing "mitigation hearing." Therein, all three (3) psychiatrists testified that respondent was not intellectually deficient. [Mitigation Hearing Tr. pages 26, 50, 81]. While the psychologist testified that respondent's intelligence quotient was measured at 81, he was quick to add that respondent's "functional intelligence" was higher. [Mitigation Hearing Tr. page 99].

The measure of respondent's mental abilities is best reflected by his statements to the state trial court immediately prior to sentencing. [Mitigation Hearing Tr. 148-156]. Therein, respondent succinctly stated his perceptions as to the supposed errors committed by the trial court, reciting the federal constitutional predicate for such grievances and parenthetically noting citations to reported decisions of this Court. While the grammer employed is more akin to that of an experienced prison writ-writer than to that of an accomplished attorney, the fact remains that respondent's recitation simply does not bespeak that of an individual of impaired intellectual abilities.

## REPLY ARGUMENT ON THE MERITS

### A. VALIDITY OF ILLINOIS GUILTY PLEA AND THE APPLICATION OF 28 U.S.C. SECTION 2254(d) TO OHIO TRIAL FINDINGS.

Respondent asserts [as did the circuit court below] that the Illinois guilty plea was invalid for the sole reason that the Cook County Circuit Court failed to make a precise "on the record recital" of the elements of attempted murder. The pivotal flaw in such argument is that it confuses the issue involved in **Boykin v. Alabama**, 395 U.S. 238 (1969) with that presented in **Henderson v. Morgan**, 426 U.S. 637 (1976).

In **Boykin**, this Court held that a plea of guilty entails the relinquishment of certain delineated constitutional rights. As a result, this Court held that the record itself must demonstrate that the accused was aware of his rights to remain silent, trial by jury, and confrontation and that the waiver of such rights must be "spread on the record." **Boykin v. Alabama**, *supra* at 242. **Johnson v. Zerbst**, 304 U.S. 458 (1938).

The seemingly prophylactic "on the record" rule of **Boykin** has engendered no small amount of confusion when contrasted to this Court's decision in **Henderson v. Morgan**, *supra*.[1] This Court has never adopted an "on the record" rule as to the elements of the offense charged in order for a plea to be voluntary and knowing.

In **Henderson v. Morgan**, *supra*, this Court was faced with an issue separate and distinct from that posited in **Boykin**. This Court itself stated:

> A plea may be involuntary *either* because the accused does not understand the nature of the constitutional protections that he is waiving, see, e.g., **Johnson v. Zerbst**, 304 U.S. 458, 464-465, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 ALR 357, *or* because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he, in fact, understood the charge, the plea cannot be voluntary in this latter sense. **Smith v. O'Grady**, 312 U.S. 329, 85 L. Ed. 859, 61 S. Ct. 572. [Emphasis added] *Id.* at page 645 n. 13.

It is the latter question which formed the focus of the inquiry. This latter issue involves not the waiver of specific constitutional protections but, rather, whether

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1. Indeed, at least one Ohio court has not been immune from the propensity to merge the on the record requisites of **Boykin** with the differing standards of **Henderson v. Morgan**. *See*, **State v. Hawk**, 55 O. App. 2d 231 (C.A. Franklin 1977). However, the Supreme Court of Ohio thereafter emphasized the distinction. **State v. Carter**, 60 Ohio St. 2d 34 (1979).

the person accused "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt."

Appellate review of such question does not hinge upon a ritualistic litany of the formal legal elements. Rather, the reviewing court must look to the totality of the circumstances of the guilty plea itself.[2] *Id.* at page 664.

The obvious confusion of the circuit court below regarding the **Boykin-Henderson** dicotomy resulted in its unwarranted refusal to accord deference to the Ohio court findings as mandated by 28 U.S.C. Section 2254(d).

In **Sumner v. Mata**, 449 U.S. 539 (1981),[3] this Court held that the Congressional mandate of 28 U.S.C. Section 2254(d) compelled a federal court sitting in a habeas corpus action to afford deference to findings of fact determined by the state judiciary.

Respondent correctly notes that 28 U.S.C. Section 2254(d) does not mandate that a federal court abdicate its responsibility to adjudicate ultimate conclusions of law premised upon such historical facts. *See,* **Sumner II**.

The circuit court below invoked 28 U.S.C. Section 2254(d)(8) for the proposition that the Ohio state court's factual findings were not supported by the record. The

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2. While respondent might suggest an "on the record" rule for the elements of the offense charged, such a mandate from the Court would only compound collateral attacks on guilty pleas and denigrate the role of defense attorneys to inform their clients.

3. *Opinion after remand,* 649 F.2d 713 (9th Cir. 1981), *vacated,* ____ U.S.____, 50 U.S.L.W. 3760 (March 22, 1982).

position of the circuit court below and that of respondent, however, are irreconcilably at odds. Respondent argues that the circuit court did, in fact, adhere to the state court findings but simply arrived at the contrary result based upon the "proper constitutional standard." Either the court below failed to follow the mandate of 28 U.S.C. Section 2254(d) or it found the exception in Section (d)(8) to be applicable. Given the unequivocal language of the opinion (A-3), it is apparent that the circuit court proceeded upon the latter premise.

The circuit court analysis falls of its own weight based upon its failure to differentiate between **Boykin** and **Henderson.** Respondent's argument fails for the plain fact that it presupposes a deference that the circuit court did not afford.

To the extent that the circuit court premised its refusal to accept the state court's factual findings upon the basis of a "**Boykin**" or prophylactic basis, it simply misperceived the issue. The standard of review is the totality of the circumstances test. Here, the circuit court *articulated* only one perceived flaw in the state trial court ruling, i.e., "[n]o explicit findings were made concerning Lonberger's credibility as a witness." (A-2). Even this supposed failing must fail in light of **LaVallee v. Delle Rose,** 410 U.S. 690 (1973).

In **LaVallee,** this Court reversed a circuit court judgment which held that 28 U.S.C. Section 2254(d) was inapplicable because the state trial court had not made *express* credibility findings. This Court stated:

> Although it is true that the state trial court did not specifically articulate its credibility findings, it can scarcely be doubted . . . that respondent's factual contentions were resolved against him. *Id.* at page 692.

A reading of the state court record (JA-17 – JA-96) demonstrates that the state court trial judge simply did not believe the self-serving testimony of respondent, else he would have had no option but to dismiss the death penalty specification.[4] Thus, in light of **LaVallee**, the circuit court most assuredly failed to accord deference to the state court's factual finding.

Respondent herein was represented by two capable attorneys. *See,* for example, **Newsweek**, Volume 77, No. 10 (March 8, 1971). Given such fact, the incredibly beneficial plea bargain arranged by counsel for respondent, and the record of the plea, the Ohio trial judge could assuredly disbelieve respondent. Absent some evidence not apparent on the record of this case, why **Lonberger's** self-serving statements should be credited, the court below erred in disturbing such finding.

## B. LIMITING INSTRUCTIONS

Respondent urges this Court to adopt a constitutional edict whereby limiting instructions can never ensure the viability of a criminal conviction when the jury is made aware of an unrelated conviction and such wholly unrelated conviction is thereafter found invalid through collateral attack. The overly expansive proposition posited by respondent not only eviscerates this Court's decision in **Spencer v. Texas**, 385 U.S. 554 (1967) but further portends to make drastic inroads into the administration of the various state criminal justice systems.

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4. There has been no suggestion that the state trial court applied an incorrect constitutional standard in ruling upon respondent's pretrial motion.

The rationale upon which **Spencer** is predicated is an assumption that jurors can and will adhere to limiting instructions which require that they consider separate and discreet factual inquiries in the course of a single judicial proceeding. Respondent seeks to engraft upon this doctrine a *per se* requirement that subsequent invalidation of an unrelated conviction which is made known to a jury during the course of trial mandates automatic vacation of the underlying substantive offense itself. This Court has never espoused such a constitutional doctrine and should decline to do so herein.

The jury in respondent's trial was expressly admonished that the fact of his earlier conviction could not be used in any manner when deliberating upon the substantive offense charged. [Trial Tr. at pages 1178-1180]. Unless and until this Court overrules **Spencer**, the jury in respondent's case is presumed to have followed their oath and rendered a fair verdict in accord with the jury instructions tendered by the state trial court.

Respondent's suggestion that jury knowledge of an unrelated criminal conviction which is subsequently invalidated is, in and of itself, cause for vacation of the substantive offense charged ends in anomalous results. For instance, the jury in **Murphy v. Florida**, 421 U.S. 794 (1975) was keenly aware, by means of pervasive pre-trial publicity, that the accused had prior criminal convictions. This Court held that it would be presumed that the jurors ahered to their oath to disregard such knowledge. However, under the analysis proposed by respondent the subsequent invalidation of Murphy's earlier convictions would mandate the vacation of his murder conviction. To like effect, the analysis urged by respondent would severely impact upon all states which allow admission of prior convictions or conduct pursuant to a "same or similar acts" statute. *See*, e.g., Ohio Revised Code Section 2945.59; **Oliphant v. Koehler**, 594 F. 2d 547 (6th Cir. 1979).

## C. HARMLESS ERROR

The instant case presents two forms of harmless error.

The uncontroverted evidence adduced at respondent's trial demonstrates that any jury would have been compelled to return a verdict of guilty to having "purposely caused the death of another." Respondent was catagorically proven to be the perpetrator of the crime and the savage mode of the victim's demise establishes beyond peradventure that the slaying was purposeful.

The second harmless error component concerns the present posture of the Ohio case itself. As the "specification" aspect of respondent's conviction was vacated by the state appellate court, any supposed error was long ago remedied by such action.

## CONCLUSION

The judgment of the Court of Appeals is in conflict with precedents of this Court and, as such, must be reversed.

Respectfully submitted,

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**Attorneys for Petitioner**

## CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Reply Brief of Petitioner have been served on respondent Robert Lonberger, by forwarding such copies through the office of his counsel, John Czarnecki, 900 Adams Street, Toledo, Ohio 43624 and Norman G. Zemmelman, 340 Spitzer Building, Toledo, Ohio 43604, by United States Mail, postpaid, this ____, day of _____, 1982. I further certify that all parties required to be served have been so served. Respondent's address is the Southern Ohio Correctional Facility at Lucasville, Ohio.

RICHARD DAVID DRAKE
*Counsel of Record*

# Docket Sheet

| NO. 81-420-CFH | TITLE | R.C. MARSHALL, Superintendent, Southern Ohio Correctional Facility, Petitioner<br>v.<br>Robert Lonberger |
|---|---|---|

| DOCKETED | COURT |
|---|---|
| Aug. 28, 1981 | United States Court of Appeals for the Sixth Circuit |

| DATE | PROCEEDINGS AND ORDERS |
|---|---|
| | Counsel for Petitioner: Richard David Drake |
| | Counsel for Respondent: John Czarnecki, Norman G. Zemmelman, John Czarnecki |
| Aug. 28, 1981 | Petition for writ of certiorari filed. (Record filed). |
| Sept. 28, 1981 | Motion of respondent for leave to proceed in forma pauperis and brief in opposition filed. |
| Oct. 7, 1981 | DISTRIBUTED. 10-30. |
| Nov. 2, 1981 | REDISTRIBUTED. 11-6. |
| Nov. 9, 1981 | REDISTRIBUTED. 11-13. |
| Nov. 20, 1981 | REDISTRIBUTED. 11-25. |
| Dec. 1, 1981 | REDISTRIBUTED. 12-4. |
| Jan. 4, 1981 | REDISTRIBUTED. 1-8. |
| Jan. 11, 1982 | The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED. |
| | --- |
| Jan. 18, 1982 | Motion of respondent for appointment of counsel filed. |
| Jan, 18, 1982 | DISTRIBUTED. 1-22. (Above motion). |
| Jan. 25, 1982 | The motion for appointment of counsel is GRANTED and it is ordered that John Czarnecki, Esquire, of Toledo, Ohio, is appointed to serve as counsel for the respondent in this case. |
| March 1, 1982 | Joint appendix filed |
| March 1, 1982 | Brief for the petitioner filed. |
| March 24, 1982 | Brief for the respondent filed. |
| June 11, 1982 | Reply brief for the petitioner filed. |
| July 13, 1982 | CIRCULATED. |
| Oct. 5, 1982 | ARGUED. |